No. 02-9065 Status: ARGUED
Title: Shakur Muhammad, aka John E. Mease, Petitioner
v.
Mark Close
Docketed: February 20, 2003
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (02-1043)
Decision Date: September 23, 2002
Rehearing Denied: November 14, 2002

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Feb 11 2003	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 24, 2003)
Mar 27 2003	Waiver of right of respondent Mark Close to respond filed.
Apr 14 2003	Response Requested . (Due May 14, 2003)
May 12 2003	Response to petition from respondent Mark Close filed.
May 20 2003	Reply of petitioner Shakur Muhammad, aka John E. Mease filed.
Jun 16 2003	Petition GRANTED The motion of petitioner for leave to proceed in forma pauperis is granted, and the petition for a writ of certiorari is granted limited to the following Questions: 1. Whether a plaintiff who wishes to bring a Sec. 1983 suit challenging only the conditions, rather than the fact or duration, of his confinement, must satisfy the favorable termination requirement of Heck v. Humphrey. 2. Whether a prison inmate who has been, but is no longer, in administrative segregation may bring a Sec. 1983 suit challenging the conditions of his confinement (i.e. his prior placement in administrative segregation) without first satisfying the favorable termination requirement of Heck v. Humphrey. Corinne Beckwith, Esq., of Washington, D.C., is appointed to serve as counsel for the petitioner in this case.
Jun 23 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 29, 2003.
Jul 31 2003	Record received from the U.S.C.A. for the 6th Circuit, 1 Binder.
Aug 11 2003	Record received from the U.S.D.C. for the Eastern District of Michigan, Northern Division. (1 Box)
Aug 26 2003	Joint appendix filed.
Aug 29 2003	Brief of petitioner Shakur Muhammad, aka John E. Mease filed.
Aug 29 2003	Brief amicus curiae of Prison Reform Advocacy Center filed.
Sep 24 2003	SET FOR ARGUMENT Monday, December 1, 2003
Sep 25 2003	CIRCULATED.
Oct 1 2003	Extension of time within which to file respondent's brief on the merits to and including October 13, 2003.
Oct 10 2003	Brief of respondent Mark Close filed.
Nov 17 2003	Lodging proposal by counsel for petitioner.
Nov 18 2003	Reply of petitioner Shakur Muhammad, aka John E. Mease filed. (Distributed)
Nov 19 2003	Motion for leave to file surreply brief filed by counsel for respondent Mark Close.
Dec 1 2003	Motion for leave to file a surreply brief GRANTED.
Dec 1 2003	Argued. For petitioner: Corinne Beckwith (Appointed by this Court). For Respondent:

Thomas L. Casey, Solicitor General, Lansing, Mich.

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
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No. 02-9065

IN THE

SUPREME COURT OF THE UNITED STATES

SHAKUR MUHAMMAD — PETITIONER
(Your Name)

VS.

Mark Close — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

1.) U.S. District Court For The Eastern District of Michigan; Northern Division
2.) U.S. Court of Appeals For The Sixth Circuit

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

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02-9065

Supreme Court, U.S.
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AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, SHAKUR MUHAMMAD, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 10 to 12.00	$	$ 10 to 12.00	$
Self-employment	$ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify):	$ 0	$	$ 0	$
Total monthly income:	$ 10 to 12.00	$	$ 10 to 12.00	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Mich. Dept. of Corrections	1576 Bluewater Hwy	Since 97 Hayloft Store	$ 10 to 12.00
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NA			$
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
NA		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings. NA

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed. NA

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support. NA

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ NA	$_____
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry-cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____
Transportation (not including motor vehicle payments)	$ NA	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$_____	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor Vehicle	$_____	$_____
Other: Court Costs - totaling near $5,000 to date	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$_____	$_____
Installment payments		
Motor Vehicle	$_____	$_____
Credit card(s)	$_____	$_____
Department store(s)	$_____	$_____
Other: _____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses: Everything but $2,000 in mortgages + Court Fees	$_____	$_____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I only receive $7.00 per month, for stamps and necessities. I have no other income and getting $10-15.00 a month, for-sixteen.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Febr. 3rd, 2003

(Signature)

ATE OF MICHIGAN - CIVIL ACTION

CERTIFICATE OF PRISONER ACCOUNT ACTIVITY
AND AFFIDAVIT REGARDING SUSPENSION OF PRISONER FEES/COSTS

Prisoner-Plaintiff/Petitioner/Appellant name and number		Defendant's/Respondent's/Appellee's name
John Mease aka Shakur Muhammad 213302	V	Mark Close

CERTIFICATE OF PRISONER ACCOUNT ACTIVITY

I am employed by the Michigan Department of Corrections at the facility identified below, at which the prisoner identified as the Plaintiff/Petitioner/Appellant is currently incarcerated.

Attached is a computer printout which accurately reflects the current spendable balance and all activity within this prisoner's account during the preceding twelve months or, if the prisoner has been incarcerated for less than twelve months, for the period of incarceration. Code "C" on the printout represents a withdrawal from the account and code "D" represents a deposit to the account. The attached printout reflects, for the reported period, an average monthly account deposit (i.e., total deposits divided by number of months) of $7.57, an average monthly account balance (i.e., total deposits minus total withdrawals divided by number of months) of ($16.61) There is a current spendable account balance of $0.00.

Date: 01/30/03 Asst Administrative Officer
Signature/Title

Ionia Maximum Facility
Correctional Facility

Note: Bottom section to be completed by prisoner and sent by prisoner to a Michigan court along with State civil pleading/claim of appeal.

AFFIDAVIT REGARDING SUSPENSION OF PRISONER FEES/COSTS

1. I am the Plaintiff/Respondent/Appellant in the attached pleading/petition/claim of appeal.

2. I am asking the court for suspension of filing fees and costs because I am indigent as reflected in the Cerificate of Prisoner Account Activity and attached computer printout.

2-5-03
Prisoner's Signature

Subscribed and sworn to before me, a Notary Public, this 6 day of February, 2003
Darrell Kelley

My Commission Expires:

CSJ-276 8/97
4835-3276

'chigan Department Of Corrections

Trust Account Statement

For the period 02/26/2002 to 01/30/2003

MDOC Nbr.: 213302 Name: MEASE, JOHN EUGENE Current Lock Loc.: 3-068
Birth Date: 04/13/1962 Location: IONIA MAXIMUM CORRECTION Jurisdiction Dates: 11/30/1990 Active: Yes
Current Balance: .00 Hold Balance: .00 Account Dates: 02/26/2002 A/C. Status: Active

Sub Account Details

Account Code	Account Name	Balance As of 02/26/2002	Balance As of 01/30/2003
Trust-Ionia Maximum Caseload			
2101	Offender Funds	0.00	0.00
2198	Freeze	0.00	0.00
Trust-Alger Maximum Caseload			
2101	Offender Funds	0.00	0.00
2198	Freeze	0.00	0.00
Trust-Marquette Prison Caseload			
2101	Offender Funds	0.00	0.00
2198	Freeze	0.00	0.00
Trust-Standish Facility Caseload			
2101	Offender Funds	0.00	0.00
2198	Freeze	0.00	0.00

Debts & Obligations

Deduction Type		Information No.	Effective Date	Original Amount	Amount Paid	Amount Owed
Trust-Ionia Maximum Caseload						
LSO	Legal Supplies Obligation	861129	05/10/2002	2.50	0.00	2.50
LSO	Legal Supplies Obligation	1202515	06/11/2002	1.65	0.00	1.65
OC	Federal Filing Fee	98-CV-10153-BC	09/15/1998	150.00	0.00	150.00
OCIS	Indigent Loan Obligation	ID9394 08/98	09/01/1998	1.88	0.00	1.88
ODEN	Dental Fee(s) Obligation	HCD346 12/17/97	01/02/1998	3.00	0.00	3.00
ODEN	Dental Fee(s) Obligation	3793420	01/27/2003	3.00	0.00	3.00
OLCST	Legal Copies (State)	I12583 11/01	12/03/2001	15.60	0.00	15.60
OLCST	Legal Copies (State)	I12849 02/02	02/26/2002	1.20	0.00	1.20
OLCST	Legal Copies (State)	2708571	10/21/2002	1.40	0.00	1.40
OLPOS	Legal Postage (State)	ID8541 08/97	09/02/1997	1.60	0.00	1.60
OLPOS	Legal Postage (State)	ID8624 09/97	10/02/1997	0.32	0.00	0.32
OLPOS	Legal Postage (State)	ID9701 12/98	01/04/1999	1.28	0.00	1.28
OLPOS	Legal Postage (State)	ID9775 01/99	02/01/1999	1.11	0.00	1.11
OLPOS	Legal Postage (State)	I10028 03/99	04/01/1999	0.99	0.00	0.99
OLPOS	Legal Postage (State)	I10104 04/99	05/03/1999	1.21	0.00	1.21
OLPOS	Legal Postage (State)	I10648 10/99	11/01/1999	0.66	0.00	0.66
OLPOS	Legal Postage (State)	I10732 11/99	12/01/1999	0.99	0.00	0.99
OLPOS	Legal Postage (State)	I10800 12/99	01/05/2000	1.43	0.00	1.43
OLPOS	Legal Postage (State)	I11058 03/00	04/03/2000	0.33	0.00	0.33
OLPOS	Legal Postage (State)	I11370 07/00	08/01/2000	0.33	0.00	0.33
OLPOS	Legal Postage (State)	I11632 10/00	11/01/2000	0.33	0.00	0.33
OLPOS	Legal Postage (State)	I11896 02/01	03/01/2001	0.76	0.00	0.76
OLPOS	Legal Postage (State)	I12059 04/01	05/01/2001	0.68	0.00	0.68
OLPOS	Legal Postage (State)	I12326 08/01	09/06/2001	1.02	0.00	1.02
OLPOS	Legal Postage (State)	I12476 10/01	11/01/2001	0.80	0.00	0.80

Date: 01/30/2003 14:01:14

'chigan Department Of Corrections

Trust Account Statement

For the period 02/26/2002 to 01/30/2003

MDOC Nbr.: 213302 Name: MEASE, JOHN EUGENE Current Lock Loc.: 3-068
Birth Date: 04/13/1962 Location: IONIA MAXIMUM CORRECTION Jurisdiction Dates: 11/30/1990 Active: Yes
Current Balance: .00 Hold Balance: .00 Account Dates: 02/26/2002 A/C. Status: Active

Deduction Type		Information No.	Effective Date	Original Amount	Amount Paid	Amount Owed
Trust-Ionia Maximum Caseload						
OLPOS	Legal Postage (State)	I12567 11/01	12/03/2001	7.05	0.00	7.05
OLPOS	Legal Postage (State)	I12692 01/02	02/06/2002	3.67	0.00	3.67
OLPOS	Legal Postage (State)	I12834 02/02	02/26/2002	1.14	0.00	1.14
OLPOS	Legal Postage (State)	298931	03/21/2002	2.26	0.00	2.26
OLPOS	Legal Postage (State)	2004919	08/19/2002	0.34	0.00	0.34
OLPOS	Legal Postage (State)	2436541	09/27/2002	0.36	0.00	0.36
OLPOS	Legal Postage (State)	2436542	09/27/2002	0.60	0.00	0.60
OLPOS	Legal Postage (State)	2689793	10/18/2002	6.76	0.00	6.76
OMED	Medical Fee(s) and Cost(s)	HCC230	08/29/1997	3.00	0.00	3.00
OMED	Medical Fee(s) and Cost(s)	HCC292 10/1/97	10/02/1997	3.00	0.00	3.00
OMED	Medical Fee(s) and Cost(s)	HC1780 9/5/00	09/12/2000	3.00	0.00	3.00
OMED	Medical Fee(s) and Cost(s)	550779	04/12/2002	3.00	0.00	3.00
OMED	Medical Fee(s) and Cost(s)	2121920	08/30/2002	3.00	0.00	3.00
OMED	Medical Fee(s) and Cost(s)	3400001	12/19/2002	2.94	0.00	2.94
OSFF	State Filing Fee Obligation	207475	03/02/1998	19.36	16.24	3.12
TAX100	Tax Cost Obligation (100%)	96-CV-10053BC	09/15/1998	25.82	0.00	25.82
TAX100	Tax Cost Obligation (100%)	98-10153-BC	12/27/2002	755.64	0.00	755.64
Trust-Alger Maximum Caseload						
OCIS	Indigent Loan Obligation	HOO809 INDIGENT	04/11/1995	4.65	0.00	4.65
OCIS	Indigent Loan Obligation	HOO814 INDIGENT	04/27/1995	5.77	0.00	5.77
OCIS	Indigent Loan Obligation	HOO826 INDIGENT	05/22/1995	6.75	0.00	6.75
OCIS	Indigent Loan Obligation	HOO841 INDIGENT	06/22/1995	6.84	0.00	6.84
OLPOS	Legal Postage (State)	HOO799 LEGAL PO	03/15/1995	0.96	0.00	0.96
Trust-Marquette Prison Caseload						
OCIS	Indigent Loan Obligation	INDIGENT STORE	04/24/1996	7.00	0.00	7.00
OCIS	Indigent Loan Obligation	INDIGENT STORE	05/20/1996	6.40	0.00	6.40
OCIS	Indigent Loan Obligation	INDIGENT STORE	06/17/1996	6.95	0.00	6.95
OCIS	Indigent Loan Obligation	INDIGENT STORE	07/16/1996	6.95	0.00	6.95
OCIS	Indigent Loan Obligation	INDIGENT STORE	08/23/1996	6.90	0.00	6.90
OCIS	Indigent Loan Obligation	INDIGENT STORE	09/18/1996	6.70	0.00	6.70
OCIS	Indigent Loan Obligation	INDIGENT STORE	11/22/1996	6.95	0.00	6.95
OCIS	Indigent Loan Obligation	INDIGENT STORE	12/19/1996	7.00	0.00	7.00
OCIS	Indigent Loan Obligation	INDIGENT STORE	01/29/1997	5.65	0.00	5.65
OLPOS	Legal Postage (State)	POSTAGE LOAN I	01/08/1996	0.32	0.00	0.32
OLPOS	Legal Postage (State)	POSTAGE 3641	03/08/1996	0.32	0.00	0.32
OLPOS	Legal Postage (State)	POSTAGE IH364	03/08/1996	0.32	0.00	0.32
OLPOS	Legal Postage (State)	POSTAGE LOAN	03/19/1996	3.57	0.00	3.57
OLPOS	Legal Postage (State)	POSTAGE 3460	03/26/1996	0.96	0.00	0.96
OSTPR	State Property Destroyed	DAMAGES C0000	10/25/1996	61.67	0.00	61.67
Trust-Standish Facility Caseload						
NBO	Negative Balance Obligation		01/14/2002	6.88	0.00	6.88
OCIS	Indigent Loan Obligation		12/28/1993	6.56	0.00	6.56

Trust Account Statement

For the period 02/26/2002 to 01/30/2003

MDOC Nbr.: 213302 Name: MEASE, JOHN EUGENE Current Lock Loc.: 3-068
Birth Date: 04/13/1962 Location: IONIA MAXIMUM CORRECTION Jurisdiction Dates: 11/30/1990 Active: Yes
Current Balance: .00 Hold Balance: .00 Account Dates: 02/26/2002 A/C. Status: Active

Deduction Type		Information No.	Effective Date	Original Amount	Amount Paid	Amount Owed
Trust-Standish Facility Caseload						
OCIS	Indigent Loan Obligation		01/25/1994	6.92	0.00	6.92
OCIS	Indigent Loan Obligation		03/16/1994	6.99	0.00	6.99
OCIS	Indigent Loan Obligation		05/26/1994	6.95	0.00	6.95
OCIS	Indigent Loan Obligation		06/07/1994	6.43	0.00	6.43
OCIS	Indigent Loan Obligation		07/13/1994	7.00	0.00	7.00
OCIS	Indigent Loan Obligation		08/15/1994	6.98	0.00	6.98
OCIS	Indigent Loan Obligation		09/01/1994	4.97	0.00	4.97
OCIS	Indigent Loan Obligation		10/12/1994	6.98	0.00	6.98
OCIS	Indigent Loan Obligation		10/25/1994	5.35	0.00	5.35
OCIS	Indigent Loan Obligation		12/02/1994	4.00	0.00	4.00
OCIS	Indigent Loan Obligation		12/28/1994	5.90	0.00	5.90
OCIS	Indigent Loan Obligation		02/03/1995	6.95	0.00	6.95
OCIS	Indigent Loan Obligation		07/26/1995	6.10	0.00	6.10
OCIS	Indigent Loan Obligation		09/21/1995	7.00	0.00	7.00
OCIS	Indigent Loan Obligation		10/24/1995	6.90	0.00	6.90
OCIS	Indigent Loan Obligation		11/21/1995	6.90	0.00	6.90
OCIS	Indigent Loan Obligation		12/14/1995	6.70	0.00	6.70
OCIS	Indigent Loan Obligation		01/18/1996	6.95	0.00	6.95
OCIS	Indigent Loan Obligation		02/19/1997	6.60	0.00	6.60
OCIS	Indigent Loan Obligation		03/19/1997	7.00	0.00	7.00
OCIS	Indigent Loan Obligation		04/18/1997	7.00	0.00	7.00
OCIS	Indigent Loan Obligation		06/06/1997	7.00	0.00	7.00
OCIS	Indigent Loan Obligation		06/17/1997	6.90	0.00	6.90
OLCST	Legal Copies (State)		08/30/1995	0.64	0.00	0.64
OLCST	Legal Copies (State)		09/07/1995	0.32	0.00	0.32
OLCST	Legal Copies (State)		09/11/1995	0.80	0.00	0.80
OLCST	Legal Copies (State)		09/15/1995	29.10	0.00	29.10
OLPOS	Legal Postage (State)		08/24/1995	0.64	0.00	0.64
OLPOS	Legal Postage (State)		08/24/1995	0.64	0.00	0.64
OLPOS	Legal Postage (State)		08/30/1995	0.32	0.00	0.32
OLPOS	Legal Postage (State)		08/30/1995	0.96	0.00	0.96
OLPOS	Legal Postage (State)		08/31/1995	0.64	0.00	0.64
OLPOS	Legal Postage (State)		08/31/1995	2.94	0.00	2.94
OLPOS	Legal Postage (State)		09/11/1995	0.32	0.00	0.32
OLPOS	Legal Postage (State)		09/11/1995	3.72	0.00	3.72
OLPOS	Legal Postage (State)		09/15/1995	1.10	0.00	1.10
OLPOS	Legal Postage (State)		02/04/1997	5.14	0.00	5.14
OLPOS	Legal Postage (State)		03/12/2002	0.32	0.00	0.32
OMED	Medical Fee(s) and Cost(s)		10/17/1997	3.00	0.00	3.00
OMED	Medical Fee(s) and Cost(s)		03/13/1998	2,113.75	0.00	2,113.75

Transaction Details

Trust Account Statement

For the period 02/26/2002 to 01/30/2003

MDOC Nbr.: 213302 Name: MEASE, JOHN EUGENE Current Lock Loc.: 3-068
Birth Date: 04/13/1962 Location: IONIA MAXIMUM CORRECTION Jurisdiction Dates: 11/30/1990 Active: Yes
Current Balance: .00 Hold Balance: .00 Account Dates: 02/26/2002 A/C. Status: Active

GJ No.	Date	Description		Debit	Credit
Trust-Ionia Maximum Caseload					
17888	02/26/2002	***AD Admission/Transfer Receipt***	.00		
		1105 Admission Receipts		0.00	
		2101 Offender Funds			0.00
	Narration:	*Admission/Transfer Receipt*			
200175	03/14/2002	***SCH School Stipend Receipt***	10.03		
		1119 School Stipend Receipts		10.03	
		2556 State Filing Fee(s) Payable			1.03
		2101 Offender Funds			9.00
	Narration:	*Batch: 2224, Ref:*			
251685	03/18/2002	***CRT Commissary Regular Transaction***	8.97		
		2101 Offender Funds		8.97	
		2501 Payable to Commissary			8.97
	Narration:	*R Commissary TXN :*			
298931	03/21/2002	***LPOSD Legal Postage Disbursement (State)***	2.29		
		2101 Offender Funds		0.03	
		2509 Postage (State) Payable			0.03
	Narration:	*Batch: 7803, Ref:98-10153 -*			
550779	04/12/2002	***MEDD Medical Fee(s) & Cost(s) Disbursement***	3.00		
		2101 Offender Funds		0.00	
		2589 Medical Fee(s) & Cost(s) - Direct			0.00
	Narration:	*Batch: 18228, Ref:4/11 visit -*			
861129	05/10/2002	***LSD Legal Supplies Disbursement***	2.50		
		2101 Offender Funds		0.00	
		2590 Miscellaneous Payable - Direct			0.00
	Narration:	*Batch: 31323, Ref:U2 -*			
1202515	06/11/2002	***LSD Legal Supplies Disbursement***	1.65		
		2101 Offender Funds		0.00	
		2590 Miscellaneous Payable - Direct			0.00
	Narration:	*Batch: 45236, Ref:U3 -*			
1230796	06/13/2002	***SCH School Stipend Receipt***	1.18		
		1119 School Stipend Receipts		1.18	
		2101 Offender Funds			1.18
	Narration:	*Batch: 41536, Ref:*			
1548032	07/11/2002	***SCH School Stipend Receipt***	7.08		
		1119 School Stipend Receipts		7.08	
		2101 Offender Funds			7.08
	Narration:	*Batch: 56624, Ref:6/02*			
1819240	08/05/2002	***CRT Commissary Regular Transaction***	8.23		
		2101 Offender Funds		8.23	
		2501 Payable to Commissary			8.23
	Narration:	*R Commissary TXN :*			
2004919	08/19/2002	***LPOSD Legal Postage Disbursement (State)***	.37		
		2101 Offender Funds		0.03	
		2583 Postage (State) Payable - Direct			0.03
	Narration:	*Batch: 75954, Ref:98-CV-10153-BC -*			
2121920	08/30/2002	***MEDD Medical Fee(s) & Cost(s) Disbursement***	3.00		
		2101 Offender Funds		0.00	
		2589 Medical Fee(s) & Cost(s) - Direct			0.00
	Narration:	*Batch: 81413, Ref:8/27 visit -*			
2254258	09/12/2002	***SCH School Stipend Receipt***	12.98		
		1119 School Stipend Receipts		12.98	
		2556 State Filing Fee(s) Payable			3.98

Trust Account Statement

For the period 02/26/2002 to 01/30/2003

MDOC Nbr.: 213302 Name: MEASE, JOHN EUGENE Current Lock Loc.: 3-068
Birth Date: 04/13/1962 Location: IONIA MAXIMUM CORRECTION Jurisdiction Dates: 11/30/1990 Active: Yes
Current Balance: .00 Hold Balance: .00 Account Dates: 02/26/2002 A/C. Status: Active

GJ No.	Date	Description	Debit	Credit
Trust-Ionia Maximum Caseload				
		2101 Offender Funds		9.00
	Narration:	*Batch: 84748, Ref:*		
2325214	09/17/2002	***CRT Commissary Regular Transaction***	8.99	
		2101 Offender Funds	8.99	
		2501 Payable to Commissary		8.99
	Narration:	*R ... -Commissary TXN -*		
2436541	09/27/2002	***LPOSD Legal Postage Disbursement (State)***	.37	
		2101 Offender Funds	0.01	
		2583 Postage (State) Payable - Direct		0.01
	Narration:	*Batch: 93647, Ref:02-1043 -*		
2436542	09/27/2002	***LPOSD Legal Postage Disbursement (State)***	.60	
		2101 Offender Funds	0.00	
		2583 Postage (State) Payable - Direct		0.00
	Narration:	*Batch: 93647, Ref:02-1043 -*		
2570983	10/10/2002	***SCH School Stipend Receipt***	11.80	
		1119 School Stipend Receipts	11.80	
		2556 State Filing Fee(s) Payable		2.80
		2101 Offender Funds		9.00
	Narration:	*Batch: 95619, Ref:*		
2636726	10/15/2002	***CRT Commissary Regular Transaction***	8.96	
		2101 Offender Funds	8.96	
		2501 Payable to Commissary		8.96
	Narration:	*R ... -Commissary TXN -*		
2689793	10/18/2002	***LPOSD Legal Postage Disbursement (State)***	6.80	
		2101 Offender Funds	0.04	
		2583 Postage (State) Payable - Direct		0.04
	Narration:	*Batch: 103275, Ref:90-52017-FC -*		
2708571	10/21/2002	***LCSTD Legal Copies Disbursement (State)***	1.40	
		2101 Offender Funds	0.00	
		2581 Copies (State) Payable - Direct		0.00
	Narration:	*Batch: 104084, Ref: -*		
2960815	11/14/2002	***SCH School Stipend Receipt***	13.57	
		1119 School Stipend Receipts	13.57	
		2556 State Filing Fee(s) Payable		4.57
		2101 Offender Funds		9.00
	Narration:	*Batch: 109974, Ref:*		
3094165	11/25/2002	***CRT Commissary Regular Transaction***	8.97	
		2101 Offender Funds	8.97	
		2501 Payable to Commissary		8.97
	Narration:	*R ... -Commissary TXN -*		
3183723	12/05/2002	***SCH School Stipend Receipt***	10.62	
		1119 School Stipend Receipts	10.62	
		2556 State Filing Fee(s) Payable		1.65
		2101 Offender Funds		8.97
	Narration:	*Batch: 121697, Ref:*		
3214246	12/06/2002	***CRT Commissary Regular Transaction***	8.94	
		2101 Offender Funds	8.94	
		2501 Payable to Commissary		8.94
	Narration:	*R ... -Commissary TXN -*		
3400001	12/19/2002	***MEDD Medical Fee(s) & Cost(s) Disbursement***	3.00	
		2101 Offender Funds	0.06	

Trust Account Statement

For the period 02/26/2002 to 01/30/2003

MDOC Nbr.: 213302 Name: MEASE, JOHN EUGENE Current Lock Loc.: 3-068
Birth Date: 04/13/1962 Location: IONIA MAXIMUM CORRECTION Jurisdiction Dates: 11/30/1990 Active: Yes
Current Balance: .00 Hold Balance: .00 Account Dates: 02/26/2002 A/C. Status: Active

GJ No.	Date	Description	Debit	Credit
Trust-Ionia Maximum Caseload				
		2589 Medical Fee(s) & Cost(s) - Direct		0.06
	Narration:	*Batch: 130057, Ref:12/11 visit -*		
3589958	01/09/2003	***SCH School Stipend Receipt***	11.21	
		1119 School Stipend Receipts	11.21	
		2556 State Filing Fee(s) Payable		2.21
		2101 Offender Funds		9.00
	Narration:	*Batch: 134502, Ref:*		
3658635	01/14/2003	***MEDD Medical Fee(s) & Cost(s) Disbursement***	3.00	
		2101 Offender Funds	3.00	
		2589 Medical Fee(s) & Cost(s) - Direct		3.00
	Narration:	*Batch: 139216, Ref:1/13/02 visit -*		
3717551	01/17/2003	***CRT Commissary Regular Transaction***	6.00	
		2101 Offender Funds	6.00	
		2501 Payable to Commissary		6.00
	Narration:	*R ... -Commissary TXN -*		
3793420	01/27/2003	***DEND Dental Co-Pay Disbursement***	3.00	
		2101 Offender Funds	0.00	
		2588 Dental Fee(s) Payable - Direct		0.00
	Narration:	*Batch: 144260, Ref:1/8 visit -*		
Trust-Standish Facility Caseload				
3733787	01/21/2003	***REL Release***	.00	
		2101 Offender Funds	0.00	
	Narration:	*TRF ICF*		

Total Receipts:	***78.47***
Total Disbursments:	***90.04***

Michigan Department Of Correctio

RACCS History Report

Date Range: 01/30/2002 - 02/26/2002

MDOC Nbr.: 213302
Offender Name: MEASE, JOHN EUGE

Location	Code	Date	Amount	Sub Code	Batch #	Assn #	Narrative
ICF	D	02/14/2002	12.39	110	025044		JAN SCHOOL PAYROLL
ICF	C	02/19/2002	9.00	092	C93603		STORE PURCHASE
ICF	C	02/22/2002	3.83	034	025080		PD FF 207475
ICF	C	02/22/2002	2.23	034	025080		PD FF 207475
ICF	C	02/22/2002	3.57	034	025080		PD FF 207475
ICF	C	02/22/2002	4.28	034	025080		PD FF 207475
ICF	C	02/22/2002	6.57	034	025080		PD FF 207475
ICF	C	02/22/2002	1.85	034	025080		PD FF 207475
ICF	C	02/22/2002	1.80	039	025077		PD CC 96-CV-10053BC
ICF	C	02/22/2002	4.91	034	025080		PD FF 207475
ICF	C	02/22/2002	4.34	034	025080		PD FF 207475
ICF	C	02/22/2002	6.04	034	025080		PD FF 207475
ICF	C	02/22/2002	3.39	034	025080		PD FF 207475
ICF	C	02/22/2002	4.36	034	025080		PD FF 207475
ICF	C	02/22/2002	4.21	034	025080		PD FF 207475
ICF	C	02/22/2002	4.41	034	025080		PD FF 207475
ICF	C	02/22/2002	6.60	034	025080		PD FF 207475
ICF	C	02/22/2002	.31	039	025077		PD CC 96-CV-10053BC
ICF	C	02/22/2002	1.64	034	025080		PD FF 207475
ICF	C	02/22/2002	5.98	034	025080		PD FF 207475
ICF	C	02/22/2002	4.83	034	025080		PD FF 207475
ICF	C	02/22/2002	5.45	034	025080		PD FF 207475
ICF	C	02/22/2002	2.59	034	025080		PD FF 207475
ICF	C	02/22/2002	6.03	034	025080		PD FF 207475
ICF	C	02/22/2002	4.37	034	025080		PD FF 207475
ICF	C	02/22/2002	1.43	039	025077		PD CC 96-CV-10053BC
ICF	C	02/22/2002	1.85	034	025080		PD FF 207475
ICF	C	02/22/2002	5.39	034	025080		PD FF 207475
ICF	C	02/22/2002	3.18	039	025077		PD CC 96-CV-10053BC
ICF	C	02/22/2002	4.93	034	025080		PD FF 207475
ICF	C	02/22/2002	5.90	034	025080		PD FF 207475
ICF	C	02/22/2002	5.98	034	025080		PD FF 207475
ICF	C	02/22/2002	3.99	034	025080		PD FF 207475
ICF	C	02/22/2002	6.78	034	025080		PD FF 207475
ICF	C	02/22/2002	4.80	034	025080		PD FF 207475
ICF	C	02/22/2002	5.26	034	025080		PD FF 207475
ICF	C	02/22/2002	6.01	034	025080		PD FF 207475
ICF	C	02/22/2002	4.97	034	025080		PD FF 207475
ICF	C	02/22/2002	2.27	034	025080		PD FF 207475
ICF	C	02/22/2002	4.84	034	025080		PD FF 207475
ICF	C	02/22/2002	4.61	034	025080		PD FF 207475

Date: 01/30/2003 14:01:26

Michigan Department Of Correctio

RACCS History Report

Date Range: 01/30/2002 - 02/26/2002

MDOC Nbr.: 213302
Offender Name: MEASE, JOHN EUGE

Location	Code	Date	Amount	Sub Code	Batch #	Assn #	Narrative
ICF	C	02/22/2002	5.39	034	025080		PD FF 207475
ICF	C	02/22/2002	4.29	034	025080		PD FF 207475
ICF	C	02/22/2002	6.04	034	025080		PD FF 207475
ICF	C	02/22/2002	4.86	039	025077		PD CC 96-CV-10053BC
ICF	C	02/25/2002	4.86	034	25080A		PD FF 207475

Total Deposits (D): $12.39
Total Charges (C): $200.22

ORIGINAL

No. 02-9065

Supreme Court, U.S.
FILED
FEB 11 2003
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SHAKIR MUHAMMAD — PETITIONER
(Your Name)

vs.

MARK CLOSE — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals For The Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SHAKIR Muhammad
(Your Name)

1576 Bluewater Hwy.
(Address)

Ionia, Michigan 48846
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

I. IS THE APPELLATE COURT'S HOLDING CONTRARY TO RULES PROMULGATED BY THIS COURT PURSUANT TO TITLE 28 U.S.C. §2072, SPECIFICALLY FEDERAL RULES OF CIVIL PROCEDURE, RULE 15 (A);

II. IS THE APPLICATION OF THE "FAVORABLE-TERMINATION REQUIREMENT" OF HECK V. HUMPHREY, 512 U.S. 477 (1994) AS APPLIED IN HUEY V. STINE, 230 F.3d 226 (6th Cir. 2000) THE CORRECT STANDARD FOR ANALYZING 42 U.S.C. §1983 CLAIMS BY PRISONERS THAT ARE NO LONGER "IN CUSTODY" FOR PURPOSES OF 28 U.S.C. §2254 HABEAS CORPUS RELIEF OR DOES THIS COURT'S HOLDING IN SPENCER V. KEMNA, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) STATE ANOTHER PRECEDENT, AND HOW DOES EITHER DOCTRINE APPLY TO THIS CASE; AND,

III. DID THE APPELLATE COURT ERROR IN AFFIRMING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN THIS CASE?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
SPENCER V. KEMNA, 523 U.S. 1 (1998)	3, 8, 10,
HECK V. HUMPHREY, 512 U.S. 477 (1994)	5, 4, 7, 8, 9, 10,
PREISER V. RODRIGUEZ, 411 U.S. 475 (1973)	8,
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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

I.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was SEPT. 23RD, 2002

[ ] No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: NOV. 14TH, 2002, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT OF U.S. CONSTITUTION:
CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF; OR ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS, OR THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE, AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.

42 U.S.C. §1983: EVERY PERSON WHO, UNDER COLOR OF ANY STATUTE, ORDINANCE, REGULATION, CUSTOM, OR USAGE, OF ANY STATE OR TERRITORY OR THE DISTRICT OF COLUMBIA, SUBJECTS, OR CAUSES TO BE SUBJECTED, ANY CITIZEN OF THE UNITED STATES OR OTHER PERSON WITHIN THE JURISDICTION THEREOF TO THE DEPRIVATION OF ANY RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS, SHALL BE LIABLE TO THE PARTY INJURED IN AN ACTION AT LAW, SUIT IN EQUITY, OR OTHER PROPER PROCEEDING FOR REDRESS. FOR THE PURPOSES OF THIS SECTION, ANY ACT OF CONGRESS APPLICABLE EXCLUSIVELY TO THE DISTRICT OF COLUMBIA SHALL BE CONSIDERED TO BE A STATUTE OF THE DISTRICT OF COLUMBIA.

28 USC §2072: AUTHORITY FOR PROMULGATION OF RULES....

28 USC §2254: HABEAS CORPUS STATUTE...

FEDERAL RULE OF CIVIL PROCEDURE, RULE 15 (a). AMENDMENTS.
A PARTY MAY AMEND THE PARTY'S PLEADING ONCE AS A MATTER OF COURSE AT ANY TIME BEFORE A RESPONSIVE PLEADING IS SERVED OR, IF THE PLEADING IS ONE TO WHICH NO RESPONSIVE PLEADING IS PERMITTED AND THE ACTION HAS NOT BEEN PLACED UPON THE TRIAL CALENDAR, THE PARTY MAY SO AMEND IT AT ANY TIME WITHIN 20 DAYS AFTER IT IS SERVED. OTHERWISE A PARTY MAY AMEND THE PARTY'S PLEADING ONLY BY LEAVE OF COURT OR BY WRITTEN CONSENT OF THE ADVERSE PARTY; AND LEAVE SHALL BE FREELY GIVEN WHEN JUSTICE SO REQUIRES....

STATEMENT OF THE CASE

Petitioner filed this civil rights action under 42 USC §1983 in June of 1998 while incarcerated within the Michigan Department of Corrections (MDOC) at Ionia Maximum Facility, he was imprisoned at Standish Maximum Facility (SMF) at all times relevant to this suit. The Respondent, Mark Close is a correctional officer at SMF. Petitioner's complaint alleges first Respondent violated his First Amendment Right to petition by retaliating against him for prior lawsuits and grievances filed against Respondent and others. Respondent accomplished this retaliation by instigating an incident with Petitioner on May 21st, 1997, and then writing a misconduct Report for a greater offense than first merited by Petitioner's conduct, resulting in Petitioner being confined to pre-hearing detention. Petitioner filed his complaint requesting expungement of the misconduct, compensatory and punitive damages. Appendix C, U.S. Court of Appeals Joint Appendix (J.A.), at p. 14. Respondent submitted his first Motion for Dismissal or Summary Judgment on 7-31-98. Appendix C, pp. 17-30. Petitioner submitted a response in opposition and moved for leave to amend his complaint. Appendix D, Motion to Amend Complaint. Petitioner submitted copies of his Exhibits A thru C on 8-17-98 to be attached to Complaint. See Appendix E. The Magistrate Judge Recommended that Respondent Motion to dismiss or for summary judgment be denied and that Petitioner's Motion to amend be granted. Appendix C, pp. 31-65. Respondent filed objection with NO opposition to the Petitioner's

Motion to amend. The district court adopted the Report of the Magistrate and Petitioner submitted his Amended Complaint. Appendix C, pp. 66-83, District Court Adopts Magistrates Report and Amended Complaint.

The district court then appointed Wendy Kaune to represent Petitioner and Ms. Kaune proceeded through the discovery stage with no prior experience in prisoner litigation. Depositions were conducted without Petitioner. Appendix C, J.A., p. 84. Respondent submitted another motion to dismiss on grounds of failure to exhaust and lack of physical injury under Prisoner Litigation Reform Act. Appendix C, pp. 85-120 of J.A. The Magistrate Recommended that the motion be denied and the district court adopted the Magistrates Report. Appendix C, J.A., pp. 122-134.

Following discovery, the Respondent again moved for summary judgment. Appendix C, J.A., pp. 135-186. Petitioner's counsel submitted a Motion in Opposition. Appendix C, J.A., 187-205. The Magistrate Recommend that Respondents Motion for Summary Judgment be granted. Appendix C, J.A., pp. 215-232. Petitioner's appointed Refused to submit a response in opposition, and Petitioner motioned the court for leave to file a pro se response in opposition which the court granted. Appendix F, Order Granting Extention of Time To File Objections. The district court adopted the Magistrates Report and granted summary judgment to Respondent. Appendix C, J.A., pp. 321-326. Petitioner filed his Notice of Appeal in pro se. Appendix C, J.A., pp. 327-341.

On Appeal, Petitioner argued that genuine issues of

Material fact exists precluding the grant of summary judgment with respect to whether Respondent retaliated against him in violation of the First Amendment. Appendix-G, Appellants Brief. Respondent submitted his Brief on Appeal. Appendix H. Petitioner submitted a Reply Brief. Appendix-I. The Appellate court affirmed the judgment of the district court stating that Petitioners claim was barred by the doctrine of Heck v. Humphrey, 512 US 477 (1994). Appendix A, p.2.

Petitioner moved the appeals court for rehearing on 9-26-02 and the court denied his petition on 11-14-02. See Appendix J and Appendix B, respectively.

Petitioner now seeks certiorari with this Court contending that the Sixth Circuit's Application of Heck, as stated in Huey v. Stine, 230 F.3d 226 (2000) is in conflict with other circuits and is an erroneous application of the Heck doctrine in light of this Courts holding in Spencer v. Kenna, 523 US 477 (1998). Petitioner also contends that the Appellate courts holding is erroneous because it is based upon requests made in the original complaint, that were omitted from the amended complaint which lawfully supersedes the original complaint.

REASONS FOR GRANTING THE PETITION

In the 9-23-02 Order of the Sixth Circuit, the court concluded:

> "The plaintiff... requests that "the misconduct charges [be] expunged from his file." J.A. at 14. Thus this case falls directly within the doctrine of Heck v. Humphrey, 512 US 477 (1994), which this circuit applied to a prisoner seeking damages and expungement of a disciplinary infraction in Huey v. Stine, 230 F.3d 226, 228 (6th Cir. 2000). "In order to grant the plaintiff in this case the relief he seeks, we would have to unwind the judgment of the state agency." Id. at 230. Thus Heck bars the plaintiffs action under 42 USC §1983."

Appendix A, COA Order 9-23-02, p.2.

Petitioner moved the court for rehearing pursuant to Fed. R. App. Pro., Rule 40 (A)(2) and the court denied the petition for rehearing on 11-14-02. See Appendix J, Petition For Rehearing submitted on 9-26-02 and Appendix B, Order Denying Petition.

Accordingly, Petitioner states the following reasons this Court should grant this petition for certiorari:

I. THE APPELLATE COURT'S HOLDING IS CONTRARY TO RULES PROMULGATED BY THIS COURT PURSUANT TO TITLE 28 USC §2072.

The Congress of the United States gave statutory authority to promulgate Rules of Civil Procedure to

the Supreme Court pursuant to 28 USC §2072. This Court, in its discretion, promulgated Federal Rule of Civil Procedure (FRCP), Rule 15 (A) which provides in relevant part that:

> ... a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Fed.R.Civ.P., Rule 15(A).

On 6-2-98, Petitioner submitted his original complaint stating issues of First Amendment retaliation by Respondent. Appendix C, J.A., pp. 10-16. On 7-31-98, Respondent submitted his first Motion to Dismiss or for Summary Judgment. Appendix C, J.A., 17-30. In response to Respondent's Motion, Petitioner submitted a Motion in Opposition, and a Motion to Amend his Complaint. Appendix D, Motion To Amend Complaint. On 11-24-98, the district court Magistrate submitted his recommendation to the district court judge suggesting that Petitioner's Motion to Amend his complaint be granted, and stated that "[p]laintiff is not seeking to add or change any factual allegations, and considering that Defendant has not registered any opposition to the Motion to Amend, I conclude that the Defendant would not be prejudiced by this Court's allowing the Plaintiff to Amend his complaint. Appendix C, J.A., p. 38. The district court entered order Adopting the Magistrate's report and on 4-7-99 Petitioner submitted his Amended Complaint. Appendix C, J.A. pp. 66-83.

As stated above, the court held that "plaintiff... requests

that "the misconduct charge [be] expunged from his file." J.A. at 14...," and when the court was notified by petition for rehearing that such requests were omitted from the Amended Complaint, the court refused to acknowledge the error. See Appendix J and B, respectfully.

Petitioner argues that the court errored in referring to the original complaint instead of the amended complaint which lawfully supersedes the prior pleadings. See Luckett v. Tuenes, 18 F.Supp2d 835 (W.D.Tenn. 1998) (An amended complaint supersedes the prior complaint...) Also see Ping Tau Bion v. Taylor, 23 Fed.Appx. 75 (CA 2 NY, 2001) (An amended complaint ordinarily supersedes the original and renders it of no legal effect); Armstrong v. Davis, 275 F.3d 849, (CA 9 Cal, 2001) (Amended pleadings supersede original.); and Meterlogic, Inc., v. Copier Solutions, Inc., 185 F.Supp2d 1292 (S.D Fla, 2002) (An Amended complaint supersedes a previously filed complaint.)

Petitioner further contends that to allow the Appellate court to manipulate the record for purposes of expediately disposing of prisoner claims, would only result in more open disregard of the few rights prisoners possess.

Petitioner believes he is entitled to relief from the judgment of the court and petitions this Court for Certiorari Relief.

II. THE APPELLATE COURT ERRORED IN APPLYING THE DOCTRINE OF HECK TO THIS CASE AND THE HECK DOCTRINE DOES NOT BAR PETITIONER'S FIRST AMENDMENT CLAIM.

Petitioner initiated this Claim under 42 USC §1983 alleging that Respondent violated his First Amendment Right to petition by retaliating against him for prior lawsuits and grievances filed against Respondent and others while confined at SMF, and that Respondent accomplished this retaliation by instigating a confrontation with Petitioner then charging him with misconduct greater than that warranted which required him to be confined to pre-hearing detention for 6 days. Petitioner was found not guilty of the exaggerated charge of threatening behavior and was sentenced to 7 days detention and 30 days loss of privileges for the less serious charge of Insolence. Appendix E, Exhibit A- Misconduct Hearing Report. Petitioner does not challenge that decision, but does challenge the facts resulting in his being unconstitutionally placed on pre-hearing detention for an exaggerated charge.

The Appeals court held that:

"...this case falls directly within the doctrine of Heck v. Humphrey, 512 US 477 (1994), which this circuit applied to a prisoner seeking damages and expungement of a disciplinary infraction in Huey v. Stine, 230 F.3d 226, 228 (6th Cir. 2000)." In order to grant the plaintiff in this case the relief he seeks, we would have to unwind the judgment of the state agency." Id. at 230. Thus Heck bars plaintiff's action under 42 USC §1983." Appendix A, p. 2.

Petitioner contends that the court erroneously applied Heck to this case.

In Heck, this Court decided whether a plaintiff may bring a §1983 claim for damages that challenges the underlying conviction or sentence and concluded that claims that call into question the lawfulness of a conviction or confinement should not be cognizable under §1983. Id. at 484-87, 114 S Ct 2364.

Petitioner concedes that §1983 is not a substitute for a writ of habeas corpus submitted under 28 USC §2254.

In Preiser v. Rodriguez, 411 US 475 (1973), this Court explained that a prisoner may properly bring suit under §1983, however a prisoner challenging "the fact or length of his custody" must pursue his claim through a writ of habeas corpus. This Court held that Preiser does not bar a §1983 claim where an inmate seeks an injunction to require a hearing to determine whether there was probable cause for pretrial detention. Gerstein v. Pugh, 420 US 103, 107-08 (1975). This Court held that a successful claim by a prisoner would not lead to vacation of his conviction. Id. at 119.

In Heck, this Court held that if a §1983 claim by a prisoner would necessarily imply the invalidity of a conviction the court must dismiss the complaint unless the plaintiff can demonstrate that the conviction has been reversed, expunged, or called into question by federal court's issuance of a writ of habeas corpus. Id. at 2372.

In Spencer v. Kenna, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998), this Court's latest Ruling on this issue, the Justices took the opportunity to clarify their positions regarding the scope

of the Heck Rule in the opinion of Justice Souter, who was joined by Justices O'Connor, Ginsburg and Breyer, who wrote: "The better view, then, is that a former prisoner, no longer "in custody," may bring a §1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." Id. at 990, 118 S.Ct 978 (Souter, J., concurring). Justice Ginsburg reiterated her agreement in her separate concurrence: I have come to agree with Justice Souter's reasoning: Individuals without recourse to the habeas statute because they are not 'in custody'... fit within §1983's 'broad reach'. Id.

In Jenkins v. Haubert, 179 F3d 19 (2nd Cir. 1999), the court held that this Court simply never has "announced that the Heck rule bars a prisoner's challenge under §1983 to an administrative or disciplinary sanction that does not affect the overall length of confinement." Jenkins, 179 F3d at 27, as quoted from Dewalt v. Carter, 224 F3d 607, 616 (7th Cir. 2000).

In Dewalt, the court concluded that: "... [W]e, like the Second Circuit in Jenkins, are hesitant to apply the Heck rule in such a way as would contravene the pronouncement of five sitting Justices. See id. The concurring and dissenting opinions in Spencer reveal that five Justices now hold the view that §1983 action must be available to challenge constitutional wrongs where federal habeas is not available. Although this perspective

originally had been a minority view, it is not after Spencer." Id. at 116-17.

There is clear conflict in the Circuit Courts regarding the application of the Heck rule after Spencer and Petitioner believes it imperative that this Court decide this issue.

The First and Sixth Circuits rely on Agostini v. Felton, 117 S.Ct 1997, 2017, (1997), in which this Court "admonished the lower courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and leave to the Court "the prerogative of overruling its own decisions." (As quoted from Figueroa v. Rivera, 147 F3d 77, N.3 (1st Cir. 1998).)

The Seventh Circuit countered in Dewalt, stating that: "Here, however, we rely on the separate opinions not to overrule precedent, but to help guide us in deciding an open question." Id. 224 F3d at 617, N.5.

In this case, on Nov. 24th, 1998 the Magistrate Elaborated on this issue in his Report, stating that "Even if Justice Ginsburg's change of position was not considered, Heck and Balisok still would not prevent this case from proceeding." Appendix C, J.A. p. 59. Accordingly, Petitioner incorporates the Magistrate's Report in his argument as it precedes the Sixth Circuit Ruling in this which was decided in Sept. 1999. Appendix C, J.A. pp. 53-59.

Petitioner Maintains that his §1983 claim is not barred by Heck as his requested relief is based solely upon the Respondent's Retaliatory imposition of an exaggerated misconduct charge which resulted in Petitioner's unwarranted confinement to

pre-hearing detention for 6 days. Appendix E, Exhibit A.
The imposition of the 6 days of mandatory pre-hearing detention is at issue, and whether Respondent intentionally exaggerated the misconduct charge for the purposes of retaliating against Petitioner for exercising his Right to petition and having Petitioner removed from the Retail freedoms of the general population setting. Appendix C., J.A., pp. 56-59.

Like unto this Courts holding in Gerstein, the success of this claim would not lead to a vacation of the misconduct conviction for insolence. Id. at 119.

Petitioner Maintains that he was neither "in custody" for purposes of obtaining habeas Relief pursuant to §2254.

As stated in the preceeding 'Argument I' of this petition, the Appellate court's holding that Petitioner "requests that the misconduct charge [be] expunged from his file," is an evident error by the court, as Petitioner's Amended Complaint makes No Request for expungement of the misconduct. Appendix A, at p. 2 and Appendix C, J.A. at p. 83, Respectively.

For the Reasons stated herein, Petitioner believes he is entitled to certiorari relief from the Judgment of the Appellate court.

III. THE APPELLATE COURT ERRORED IN AFFIRMING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN THIS CASE.

Petitioner initiated his pro se Appeal arguing that: 1.) the court erred in concluding that he had failed to establish the causal connection element of his Retaliation claim; and

2.) disputed issues of material fact exist precluding the district courts grant of summary judgment. Appendix G, Petitioner's Brief on Appeal.

Respondent submitted ~~a Reply~~ his Brief on Appeal contending that the district court properly granted summary judgment. Appendix H, Respondent's Brief on Appeal.

Petitioner submitted a Reply Brief in opposition. Appendix-I, Petitioner's Reply Brief.

In the Appellate courts order, the court made No specific Reference to the issues argued on appeal other than stating that," We affirm the judgment of the district court." Appendix-A, p. 2. Also, see Appendix C, J.A., 12-17-01 Dist. Court Judgment, pp. 321-26.

Petitioner, therefore Maintains and incorporates herein the arguments set forth in his Appellate briefs, and requests this Court to grant his Request for certiorari Relief as material issues of fact exist in this case Requiring submission to a jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Shakur Muhammad

Date: Feb. 3rd, 2003

No. 02-1043

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
SEP 23 2002
LEONARD GREEN, Clerk

SHAKUR MUHAMMAD, also known as John E. Mease,

Plaintiff-Appellant,

v.

MARK CLOSE, Correctional Officer,

Defendant-Appellee.

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Before: MARTIN, Chief Judge; MOORE, Circuit Judge; WISEMAN, District Judge.*

Shakur Muhammad appeals a district court grant of summary judgment for defendant in this civil rights action filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Muhammad filed his complaint in the district court alleging that the defendant corrections officer falsely charged him with major misconduct threatening behavior in retaliation for prior lawsuits and grievances plaintiff filed against defendant. Plaintiff named defendant in his individual and official capacities and sought compensatory and punitive damages and expungement of the resulting misconduct conviction on a reduced charge of insolence. Defendant moved to dismiss the complaint or for summary judgment, and plaintiff responded in opposition and moved for leave to amend his complaint. The magistrate judge recommended that defendant's motion to dismiss or for summary judgment be denied and that plaintiff's motion to amend his complaint be granted, and

*The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

"APPENDIX A"

defendant filed objections. The district court adopted the magistrate judge's recommendation and denied defendant's motion, and plaintiff filed an amended complaint.

Thereafter, the magistrate judge appointed counsel to represent plaintiff, and defendant moved to dismiss the complaint for failure to exhaust administrative remedies. The magistrate judge recommended that the motion to dismiss be denied, and defendant filed objections. The district court adopted the magistrate judge's recommendation and denied defendant's motion to dismiss.

Following discovery, defendant again moved the district court for summary judgment, plaintiff responded in opposition, and defendant submitted a reply. The magistrate judge recommended that summary judgment for defendant be granted, and the district court granted plaintiff leave to file pro se objections after counsel declined to do so. The district court adopted the magistrate judge's recommendation and granted summary judgment for defendant. Plaintiff filed a timely notice of appeal pro se. On appeal, plaintiff contends that he established a genuine issue of material fact remaining for trial with respect to whether defendant retaliated against him in violation of the First Amendment. Defendant responds that the district court's judgment was proper.

Upon de novo review, *see Brooks v. Am. Broad. Cos.*, 932 F.2d 495, 500 (6th Cir. 1991), we affirm the judgment of the district court. The plaintiff seeks punitive and compensatory damages and requests that "the misconduct charge [be] expunged from his file." J.A. at 14. Thus this case falls directly within the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), which this circuit applied to a prisoner seeking damages and expungement of a disciplinary infraction in *Huey v. Stine*, 230 F.3d 226, 228 (6th Cir. 2000). "In order to grant the plaintiff in this case the relief he seeks, we would have to unwind the judgment of the state agency." *Id.* at 230. Thus *Heck* bars the plaintiff's action under 42 U.S.C. § 1983.

Accordingly, the district court's judgment is affirmed. *See* Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
NOV 14 2002
LEONARD GREEN, Clerk

SHAKUR MUHAMMAD, also known as John E. Mease,

Plaintiff-Appellant,

v.

MARK CLOSE, Correctional Officer,

Defendant-Appellee.

ORDER

Before: MARTIN, Chief Judge; MOORE, Circuit Judge; WISEMAN, District Judge.*

Shakur Muhammad petitions the court to rehear its September 23, 2002, order that affirmed a district court grant of summary judgment for defendant in this civil rights action filed under 42 U.S.C. § 1983.

Upon consideration, the panel concludes that it acted under no misapprehension of law or fact in issuing its order. *See* Fed. R. App. P. 40(a).

Accordingly, the petition for a rehearing is denied.

ENTERED BY ORDER OF THE COURT

Clerk

*The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

"APPENDIX B"

R.86

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ATTORNEY GENERAL
CORRECTIONS DIVISION

DEC 19 2001

SHAKUR MUHAMMAD
a/k/a/ John Mease,

Plaintiff,

v.

MARK CLOSE,

Defendant.
_____/

Case No. 98-CV-10153-BC
Honorable David M. Lawson

OPINION AND ORDER ADOPTING REPORT AND RECOMMENDATION AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff filed this prisoner civil rights complaint against the defendant, a corrections officer, alleging unlawful retaliation contrary to 42 U.S.C. § 1983. After two previous dispositive motions were denied, the defendant filed his third motion for summary judgment, alleging that the plaintiff offered insufficient evidence to proceed to trial on his First Amendment retaliation claim. After reviewing the initial motion papers, the plaintiff's response, and the defendant's reply brief, the Magistrate Judge, operating under a full-case reference pursuant to 28 U.S.C. § 636(b)(1), recommended that the defendant's motion be granted. After the plaintiff's pro bono counsel declined to file objections on his behalf, the plaintiff requested the right to file his own objections, and the Court granted that request on November 8, 2001. The plaintiff filed his objections on November 29, 2001. After *de novo* review of the Magistrate Judge's Report and Recommendation, and the papers filed in this case, the Court agrees that the defendant's motion should be granted.

I.

This case arose from an incident on May 21, 1997 while the plaintiff was incarcerated at the Standish Maximum Correctional Facility ("SMF"). The plaintiff alleges that the defendant, a corrections officer at SMF, intentionally provoked the plaintiff and wrote a violation accusing the

plaintiff of Threatening Behavior, a serious offense. Specifically, the plaintiff claims that he noticed the defendant staring at him through a dining room window, and that the plaintiff stared back. In response, the defendant allegedly stormed into the dining room, and the plaintiff then rose from his seat and approached the defendant. The plaintiff was then handcuffed and led away to a detention cell.

The defendant subsequently initiated disciplinary proceedings against the plaintiff, charging him with Threatening Behavior, defined as threatening words or behavior expressing an intent to injure another. *See* MDOC P.D. 03.03.105, Pl.'s S.J. Ex. 2 at 2. Six days after the incident, a disciplinary hearing was held and the plaintiff was found not guilty of Threatening Behavior, but found guilty of the lesser charge of Insolence, defined as words, actions or other behavior intended to harass or cause alarm to an employee. *See id.* at 3. The plaintiff was punished with seven days detention and thirty days' loss of privileges.

The plaintiff alleges that the provocation and write-up was in retaliation for two prior lawsuits filed by the plaintiff against the defendant. The plaintiff first filed suit against defendant Close in 1994; Close was granted summary judgment in 1995. The second suit was filed in February, 1996 and dismissed in December, 1996.

The defendant now contends that he is entitled to summary judgment because the plaintiff has failed to come forward with sufficient evidence to support his allegations that he was subjected to adverse action and that the action taken against him, even if adverse, was in retaliation for the prior suits.

II.

In the Sixth Circuit, a prisoner alleging retaliation for engaging in an activity protected by the First Amendment must establish three elements: the plaintiff's engagement in protected conduct,

adverse action taken against the plaintiff that would deter a person of ordinary firmness from engaging in protected conduct, and proof that the adverse action was motivated at least in part by the plaintiff's engagement in the protected activity. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999) (en banc). The first element is not disputed here; even though incarcerated, the plaintiff retains the right of access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 821-24 (1977). The defendant instead challenges the plaintiff's showing on the second and third elements of his retaliation claim. The Magistrate Judge found that the defendant's showing on the second element was so one-sided that summary judgment was appropriate. However, the defendant's arguments against the third element are much stronger, and dispositive of this case.

When the plaintiff has the burden of proof on a claim, the defendant may support a motion for summary judgment when he demonstrates that the plaintiff lacks sufficient evidence on any element of that claim. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). Once the defendant has made such a showing, the plaintiff may not rely solely on his pleadings, but must offer affirmative evidence from which a reasonable fact finder could find in his favor. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The plaintiff's showing must be more than an assertion that the trier of fact could disbelieve the defendant's proffered evidence. *Street*, 886 F.2d at 1479. Even when the plaintiff does offer affirmative evidence, however, the Court must view all reasonable inferences arising from that evidence in the light most favorable to the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). As a result, although the plausibility of circumstantial evidence may be considered, any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. *Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994). However, when the evidence is so one-sided that no reasonable jury could find

for the non-moving party, summary judgment as a matter of law should be granted. *Anderson*, 477 U.S. at 251-52.

On the third element of the plaintiff's retaliation claim, causation, the defendant has demonstrated a lack of affirmative evidence for the plaintiff's claim. Specifically, the defendant points out that the incident at issue in this case occurred two and a half years after the first suit was filed and one and a half years (actually about fifteen months) after the second. The defendant correctly notes that the temporal connection between these lawsuits and the incident in question is remote. In response to the defendant's motion, the plaintiff pointed to his prior litigation with the defendant, and further stated that there has been a "constant problem between me and him from 1994, from the time he chose to involve hisself [sic] with my litigation with other officers." Pl.'s Dep., dkt. 75, Ex. 1. In this Circuit, however, temporal proximity by itself is generally insufficient to establish causation for a retaliation claim. *See Smith v. Campbell*, 250 F.3d 1032, 1038 (6th Cir. 2000); *Nguyen v. City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000). In the absence of additional probative evidence, the Sixth Circuit has specifically found that a delay of even five months is too long. *See, e.g., Hafford v. Seidner*, 183 F.3d 506, 518 (6th Cir. 1999) (two to five month delay is too long); *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986) (four months too long). The time gap in this case is fifteen months, which is clearly outside the parameters established by the Sixth Circuit. Furthermore, the plaintiff's generalized assertion of animosity between himself and the defendant is plainly insufficient. Under the plaintiff's reasoning, he would be able to proceed with a retaliation claim anytime this defendant took adverse action against him. This result would create unreasonable disorder in the prison context, where officer-inmate animosity and civil rights lawsuits have evolved into a ritualistic form of social intercourse.

Thus, the Magistrate Judge's finding that the plaintiff had not sustained his burden of proof

on this element was correct. In his objections to this finding, the plaintiff contends that temporal proximity is sufficient to establish this element, the clearly established precedential law of this Circuit to the contrary notwithstanding. He also claims that the case for causation is strengthened by his absence from SMF for much of the time between the filing of his second lawsuit and the incident in question, and his assertion that the incident was the first time in several months that the defendant and the plaintiff had any personal contact. Pl.'s Obj. at 13-14. The plaintiff also attached his log of the events he deems significant occurring between 1996 and the incident in this case. *Id.* Ex. H, at 1-4. Even if these notes were admissible, there is still no direct evidence of animosity, such as statements made by the defendant, that the Court would be required to take as true. *See Adams*, 13 F.3d at 382. Further, the conclusion is inescapable that no reasonable fact finder would draw an inference of causation from these items. The plaintiff essentially asks this Court to trust his hunch that the defendant's adverse action against him was motivated by his past lawsuits. Given the clear precedent in this Circuit, however, that speculation and hunches are insufficient to defeat a summary judgment motion, the Court declines the plaintiff's invitation. *See Hartsel v. Keys*, 87 F.3d 795, 802 (6th Cir. 1996).

III.

Although, as noted in the rulings on the defendant's first two motions for summary judgment, the plaintiff's complaint properly pleads all the elements of a retaliation claim, the plaintiff has not been able to deliver factual support. The law is clear that the plaintiff may not rely on his pleadings alone. The plaintiff's prior history of litigation with the defendant is the only circumstantial support for his theory of retaliation. However, this Court is bound by Circuit precedent that rejects the sufficiency of such evidence standing alone. The Magistrate Judge's Report and Recommendation is thus correct, and the defendant's motion for summary judgment will be granted.

Accordingly, it is **ORDERED** that the Magistrate Judge's Report and Recommendation is **ADOPTED**.

It is **FURTHER ORDERED** that the defendant's Motion for Summary Judgment [dkt #73] is **GRANTED**.

DAVID M. LAWSON

DAVID M. LAWSON
United States District Judge

Dated: December 17, 2001

Copies to:
Shakur Muhammad – #213302, 1576 Bluewater Highway, Ionia, MI 48846
Wendy Davis Kanar, Esq.
Kevin Himebaugh, Esq.
Honorable Charles E. Binder, United States Magistrate Judge

CORRECTIONS DIVISION

AUG 16 2001

ASSIGNED TO:

FILED
Aug 15 3 39 PM '01
US DISTRICT COURT
EASTERN DISTRICT
BAY CITY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

R. 78

SHAKUR MUHAMMAD,
aka John E. Mease,

Plaintiff,

v.

MARK CLOSE,

Defendant.
_____/

CIVIL ACTION
NO. 98-CV-10153-BC

DISTRICT JUDGE DAVID M. LAWSON
MAGISTRATE JUDGE CHARLES BINDER

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANT CLOSE'S RULE 56(b) MOTION FOR SUMMARY JUDGMENT
(Dkt. 73)

I. RECOMMENDATION

For the reasons set forth below, **IT IS RECOMMENDED** that Defendant's motion for summary judgment be **GRANTED.**

II. REPORT

A. INTRODUCTION and FACTS

Pending, pursuant to a general case management Order of Reference from United States District Judge Robert Cleland,[1] (Dkt. 6), is Defendant Close's motion for summary judgment. Plaintiff filed a response brief (Dkt. 75) and Defendant filed a reply (Dkt. 76). Upon review of the pleadings, I conclude that pursuant to E.D. Mich. LR 7.1(e)(2), this motion is ready for Report and Recommendation without oral argument.

Plaintiff filed this prisoner civil rights complaint under 42 U.S.C. § 1983, claiming that "Defendant framed Plaintiff in retaliation for the Plaintiff's exercise of his First Amendment rights." (Compl., Dkt. 3 at 4B.) The incident in question occurred on May 21, 1997, while Plaintiff was incarcerated in general population at Standish Maximum Facility ("SMF"). Plaintiff alleges that Defendant Close, a corrections officer employed by SMF, instigated an incident with Plaintiff, and then filed an inflated misconduct charge against him, all with the intent of retaliating against Plaintiff for filing two previous civil rights lawsuits against Defendant Close and others, as well as for filing SMF grievances against Defendant.

Specifically, Plaintiff alleges that while he was eating breakfast in the dining area, he noticed Defendant Close staring at him. Plaintiff continued to eat, but when he looked up again, Defendant was still staring. At this time, Plaintiff began to stare back. Plaintiff alleges that Defendant then "made a fighting stance" towards him. (Compl., Dkt. 3 at 4A.) Plaintiff turned away to drink his coffee, and then noticed that Defendant was "coming into the dining area at a fast pace with his face contorted." (*Id.*) Plaintiff, feeling threatened by Defendant's body language and fast approach, stood up and walked towards the Defendant. Plaintiff alleges that when "Defendant and Plaintiff came within a foot of one another, Defendant stated, 'What's up,' while staring angerly [sic] at Plaintiff. Plaintiff

[1]Pursuant to Administrative Order 00-AO-045, issued August 22, 2000, United States District Judge David M. Lawson assumed responsibility for the Bay City docket effective September 5, 2000.

did not respond." Plaintiff was then handcuffed by two other officers and taken to a detention cell. (*Id.*)

Following this incident, Defendant Close filed a Major Misconduct Report charging Plaintiff with the major rule violation of "Threatening Behavior."[2] Six days after the incident, a Major Misconduct Hearing was held and Plaintiff was found not guilty of Threatening Behavior. (*Id.* at 1.) After reading witness statements from both inmates and officers, the hearing officer reduced the charge to Insolence.[3] Plaintiff was found guilty of Insolence. Plaintiff was given the disciplinary sanctions of seven days' detention and thirty days' loss of privileges for the violation. (*Id.*)

B. PROCEDURAL HISTORY

Plaintiff filed this action on June 2, 1998. The complaint alleges, first, that Defendant instigated the confrontation to provoke Plaintiff, and second, that when that plan was successful, Defendant then wrote Plaintiff up for a more severe misconduct violation, (one that required mandatory immediate detention), than was warranted by Plaintiff's

[2]"Threatening Behavior" is a major rule violation defined as: "Words, actions or other behavior which expresses an intent to injure or physically abuse another person. Such misconduct includes attempted assault and battery." MDOC P.D. 03.03.105, Attachment B at 2. It is a "[m]andatory 'nonbondable' charge." *Id.* at 1. The Policy Directive lists the following as common examples of Threatening Behavior: "Threats of sexual assault made by one prisoner to another prisoner; writing threatening letters to another person; threats made to a third person which are intended to place the person threatened in fear of harm." *Id.* at 2.

[3]"Insolence" is also classified as a major rule violation. Its definition is: "Words, actions, or other behavior which is intended to harass, or cause alarm in an employee." *Id.* at 3. It is not, however, a mandatory nonbondable charge. Common examples of Insolence are: "Abusive language, writing or gesture directed at an employee." *Id.*

actions. Plaintiff alleges that both of these acts were purposely taken in an effort to retaliate against him for exercising his constitutional right to file lawsuits.

In July 1998, Defendant Close filed his initial motion for dismissal and/or summary judgment on the following grounds: (1) that *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997), barred Plaintiff's claim; (2) that the finding of guilt on the misconduct charge defeated Plaintiff's claim that the ticket was retaliatory and an abuse of authority; and (3) that Defendant was entitled to qualified immunity. (Dkt. 9.) This Court recommended denial of the motion in a Report and Recommendation ("R&R") dated November 24, 1998. The R&R suggested that, when construing the allegations found in the complaint as true and viewing them in the light most favorable to Plaintiff, there were three issues of material fact in dispute: (1) whether Defendant intentionally committed the act of instigating a confrontation with Plaintiff; (2) whether Defendant intentionally charged Plaintiff with a more severe prison violation than was warranted; and (3) whether he did these alleged acts with the motivation to retaliate against Plaintiff for exercising his First Amendment rights. Judge Cleland adopted the Report and Recommendation on March 26, 1999, over Defendant's objections. (Dkt. 22.)

Subsequently, Plaintiff was appointed counsel and the parties engaged in discovery. Defendant Close then brought a motion for dismissal on two grounds: (1) that Plaintiff failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a); and (2) that Plaintiff failed to allege a physical injury as required by the PLRA, 42 U.S.C. § 1997e(e). On November 2, 2000, this Court

recommended denial of the motion (Dkt. 68), and on January 12, 2001, Judge Lawson adopted the Report and Recommendation over Defendant's objections. (Dkt. 71.)

Defendant Close now brings another motion for summary judgment, asserting that "after discovery, the above three issues [of material fact] have been resolved in Officer Close's favor and that there is no reasonable dispute that necessitates putting these questions before a jury." (Def.'s Mot., Dkt. 73 at 3.)

C. ANALYSIS AND CONCLUSIONS

1. Motion Standards

A motion for summary judgment will be granted under Rule 56(c) of the Federal Rules of Civil Procedure where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. All facts and inferences must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact as to an essential element of the non-movant's case. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In determining whether the moving party has met its considerable burden, a court may consider the plausibility of the moving party's evidence. *See Matsushita*, 475 U.S. at 587-88.

To defeat the motion, the non-moving party cannot rest merely on the pleadings alone. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 191 L. Ed. 2d 202 (1986). The non-moving party has an obligation to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Celotex*, 477 U.S. at 324. After examining the evidence, the court then determines "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1310 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 251-52). Summary judgment will not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

2. Retaliation Claim

a. Governing Law

When the first motion for summary judgment in this case was decided, the standard applicable to claims of retaliation for the exercise of First Amendment rights was not all that clear in the Sixth Circuit. (*See* R&R dated 11/24/98 at 12-17.) In March of 1999, however, the Sixth Circuit clarified the standard to be applied in the case of *Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999) (en banc). The *Thaddeus-X* standard is now applicable to this case. *See Herron v. Harrison*, 203 F.3d 410, 414 (6th Cir. 2000) (reversing district court's dismissal of prisoner's First Amendment retaliation claim because *Thaddeus-X* controlled even though it was decided eight months after district court dismissed the case).

In *Thaddeus-X*, the court confirmed that "government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in

substantial part by a desire to punish an individual for exercise of a constitutional right." *Thaddeus-X*, 175 F.3d at 386. The court clarified that there are three elements to a claim of retaliation based on the exercise of a specific constitutional right:

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two – that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.

Id. at 394.

The first element requires that the plaintiff show that he engaged in conduct protected by law. The court explained that when a retaliation claim is brought by a prisoner, this element must take into consideration the plaintiff's incarcerated status:

> [I]t is generally much harder for a prisoner to show that his conduct is protected because prison regulations are allowed to infringe on prisoners' rights as long as they are rationally related to a legitimate penological concern. *See Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Therefore, if a prisoner violates a legitimate prison regulation, he is not engaged in "protected conduct," and cannot proceed beyond step one.

Thaddeus-X, 175 F.3d at 395.

The term "adverse action" in the second element is derived from retaliation cases arising in the public employment context. In those cases, adverse action could include discharge, refusal to hire, or failure to promote. *Id.* at 396. In the prison context, the court explained,

> an action comparable to transfer to administrative segregation would certainly be adverse. In order to determine whether actions of lesser severity merit being deemed "adverse" for purposes of a retaliation claim, we adopt the standard suggested by Judge Posner in *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982), that an adverse action is one that would "deter a person of ordinary firmness" from the exercise of the right at stake.

Thaddeus-X, 175 F.3d at 396.

The third element -- a causal connection between the protected conduct and the adverse action -- begins with the plaintiff bearing the "burden of establishing that his protected conduct was a motivating factor behind any harm." *Id.* at 399.

b. First Element – Protected Conduct

In this case, Defendant Close does not dispute that Plaintiff has met the first element of a retaliation claim. Plaintiff claims that he was retaliated against because he named Defendant Close as a defendant in two prior lawsuits. It is well established that prisoners have a constitutional right of access to the courts, *see Bounds v. Smith*, 430 U.S. 817, 821-24, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), and therefore Plaintiff has alleged that he engaged in protected conduct.

c. Second Element – Adverse Action

Plaintiff claims that the adverse action taken against him consisted of Defendant Close provoking him by coming into the dining area with a contorted look on his face after staring and making a "fighting stance" outside the window, and then, when Plaintiff reacted, Defendant "purposely overcharg[ing] Plaintiff with a nonbondable offense in order to ensure that he received toplock prior to his hearing." (Pl.'s Resp., Dkt. 75 at 8.) Defendant Close asserts and this Court agrees that both issues – whether he instigated the confrontation and whether he inflated the misconduct charge – relate to the second prong of the *Thaddeus-X* standard. (Def.'s Mot., Dkt. 73 at 3.) As a threshold matter, I suggest

that these acts as alleged would rise to the level of "adverse action" contemplated by the *Thaddeus-X* standard because being wrongfully charged with a non-bondable major misconduct violation and therefore placed in toplock could deter a person of ordinary firmness from continuing to engage in protected conduct. *See Thaddeus-X*, 175 F.3d at 396 ("an action comparable to transfer to administrative segregation would certainly be adverse."). However, the question presented by a summary judgment motion following discovery is not whether Plaintiff has stated a claim, but "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker*, 879 F.2d at 1310.

Defendant contends that, although Plaintiff's allegations are sufficient to survive a dismissal motion, he is entitled to summary judgment because discovery has not uncovered any evidence that he provoked Plaintiff by making a "fighting stance" as Plaintiff claimed in his complaint. Defendant states: "Before discovery, it was not clear whether Officer Close instigated the confrontation with Muhammad. Based on the deposition testimony, however, there is no longer any reasonable dispute over this issue." (*Id.*)

Defendant points to the deposition testimony of Corrections Officer Richard Metevia, Resident Unit Manager Darlene McIntire, and of Plaintiff himself in support of this position, drawing attention to the fact that the testimony is consistent with Defendant's contention that he did not make a "fighting stance," but rather that he thought Plaintiff was trying to say something to him through the glass so he simply made a "what do you want" gesture by raising his palms up. Officer Metevia was standing next to Defendant Close

at the glass while they were looking into the dining area, and described the gesture made by Defendant:

> Q . . . Did you observe Mark Close making any motions towards the prisoner before he went into the chow area?
>
> A Seemed like Mease said something and Close went, I can't hear you, whatever, you know, through the glass between them.
>
> Q Now, I just realized we made a gesture, and the court reporter can't record that. Could you describe the gesture in words?
>
> A Like palms up, "what did you say," you know.
>
> Q So you lifted your lower arms up, and leaving the upper arms at your sides, you've lifted your lower arms up, palms up?
>
> A Yeah.

(Metevia Dep., Dkt. 73, Ex. 3 at 19-20.) Officer Metevia also testified that from his observations, it did not appear that Defendant Close instigated a confrontation with Plaintiff. (*Id.* at 21.) Similarly, Resident Unit Officer Darlene McIntire, who was on duty in the dining area at the time of the incident, testified at her deposition that she witnessed Defendant Close come into the "chow hall" and stop, and "then Mease just walked in further and further, came right up into his face." (McIntire Dep., Dkt. 73 at Ex. 7.)

Defendant also contends that Plaintiff's own deposition testimony is consistent with Defendant's version of what happened:

> A . . . He made this gesture towards me like this (indicating).
>
> Q Okay. So this gesture is his hands are sort of straight out in front about –
>
> A Like this (indicating).

Q About, what is that, two and a half, three feet apart. So were his palms up?

A Yes.

(Muhammad Dep., Dkt. 73, Ex. 6 at 11-12.)

When responding to a motion for summary judgment, the non-moving party cannot rest merely on the pleadings alone, *Anderson*, 477 U.S. at 248, but has an obligation to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Celotex*, 477 U.S. at 324. In this case, Plaintiff has not presented any affirmative evidence in response to Defendant's motion other than cites to his own deposition testimony where he reiterates his allegation that Defendant instigated the confrontation by making an aggressive gesture similar to a "wrestling position." (Pl.'s Resp., Dkt. 75 at 5.) Instead, Plaintiff merely discounts the testimony of officers Metevia and McIntire, pointing out that they are co-workers of Defendant Close and employees of the MDOC, the entity that would have to pay any judgment if Plaintiff prevails. Plaintiff argues that "[a] jury may well discount such testimony as self-serving and biased." (*Id.*)

When analyzing this issue in the first R&R at the pre-discovery stage, the Court of course acted on the presumption that Plaintiff would uncover evidence during discovery, such as eyewitness testimony, that would support his allegations. Now, however, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker*, 879 F.2d at 1310. On this issue of whether Defendant Close instigated

the incident by making a "fighting stance," I suggest that the evidence proffered is, under this standard, entirely one-sided – favoring the Defendant.

Defendant Close similarly claims that he is entitled to summary judgment on the issue of whether he "overcharged" Plaintiff with the misconduct violation of Threatening Behavior. Defendant points to the deposition testimony of three witnesses in support of his argument that Threatening Behavior was an appropriate charge in light of Plaintiff's conduct. First, Sergeant Walter Tipton, who also witnessed the incident, was asked whether he perceived Plaintiff's conduct as threatening, and he responded: "Looked like he might was going to hit him or something was going to happen, that was obvious. If it was me personally, yeah, I may have felt threatened, if it was me personally." (Tipton Dep., Dkt. 73, Ex. 4 at 37.)

Second, Officer Metevia testified that he thought Defendant Close acted properly in writing the ticket. (Metevia Dep., Dkt. 73, Ex. 3 at 22.) Third, Hearing Officer Arvid Perrin, who found Plaintiff not guilty of Threatening Behavior but guilty of the lesser included offense of Insolence, testified that the Threatening Behavior charge was nevertheless not unjustified. He explained that, in his opinion, the fact that Plaintiff had not made an overt move to strike Defendant Close led him to the conclusion that the standard for Threatening Behavior had not been met, however, another hearing officer could have reached a different result:

Q Now, just based on the facts of this [case], is this something where a different Hearing Officer could have reached a different decision [than] you?

A More than likely, it could have been, yes. I'm sure that some Hearing Officers would have felt that this was threatening behavior. . . .

(Perrin Dep., Dkt. 73 at Ex. 5.)

Defendant therefore asserts, supported by the testimony presented, that he "had good reason, based on the intensity of the confrontation, for writing the Threatening Behavior ticket." (Def.'s Mot., Dkt. 73 at 9.)

In response to this issue, Plaintiff again has presented no directly relevant affirmative evidence, but once more points out that the witnesses relied upon by Defendant are MDOC employees who have an interest in the matter. Plaintiff does provide the Court with a statistical report prepared by the MDOC showing major misconduct hearing statistics for all MDOC hearing officers, including the percentage of misconduct hearings where the charges were upheld, reduced, or dismissed. Plaintiff argues that Hearing Officer Perrin's testimony that another hearing officer may have found Plaintiff guilty of Threatening Behavior could be found by a jury to be "incredible" in light of the fact that the MDOC keeps such statistics and evaluates the performance of its hearing officers based upon the number of charges they uphold. (Pl.'s Resp., Dkt. 75 at 8-9.)

Once again I suggest that Plaintiff has failed to meet his burden of responding to the summary judgment motion with affirmative evidence of a sufficient disagreement to require submission to a jury. Obviously, Plaintiff does not have the burden of persuading this Court at the summary judgment stage to the same degree it would have to persuade a jury at trial. However, Plaintiff has failed to present any evidence other than Plaintiff's own allegations. His argument regarding the MDOC's performance evaluation methods

may be engaging and potentially admissible rebuttal at trial to testimony of Hearing Officer Perrin, but it is not evidence that Defendant Close's decision to charge Plaintiff with Threatening Behavior was an unreasonable overcharge in light of the facts.

d. Third Element – Causal Connection

The third element of a retaliation claim involves a defendant's subjective intent. *See Thaddeus-X*, 175 F.3d at 399. Plaintiff has the initial burden of showing that his protected conduct, which in this case was filing two previous lawsuits naming Close as a defendant, was a substantial or motivating factor behind the adverse action. *See Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). Although a court may not require that a plaintiff prove motive by clear and convincing evidence at the summary judgment stage, *see Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 1595, 140 L. Ed. 2d 759 (1998), a plaintiff nonetheless must provide more than conclusory allegations of retaliatory motive to survive summary judgment. *See Smith v. Campbell*, 250 F.3d 1032, 1038 (6th Cir. 2000).

Plaintiff here states that "it is undisputed that Plaintiff was pursuing litigation against Defendant at the time of the incident in question. The jury is then left with the subjective credibility question of whether Defendant acted as he did because of those suits." (Pl.'s Resp., Dkt. 75 at 9.) Plaintiff has not, however, alleged that Defendant Close ever made any statements that he harbored bad feelings toward Plaintiff because of these prior lawsuits or that he intended to punish Plaintiff for filing them. Rather,

Plaintiff's argument is solely that the temporal proximity between the prior lawsuits and the dining room incident demonstrates a causal connection.

Defendant Close conversely claims that the timing of the prior lawsuits supports his position that he in no way was motivated to charge Plaintiff with misconduct because he wanted to retaliate for the prior suits. Defendant has provided copies of court dockets to show that the first lawsuit naming him as a defendant was filed by Plaintiff in December 1994, and summary judgment was granted to defendants in August 1995. The second suit was filed in February 1996 and was dismissed in December 1996. (Def.'s Mot., Dkt. 73 at 12, Exs. 8 & 9.) The alleged incident of retaliation which gave rise to this lawsuit occurred in May of 1997, two and a half years after the first suit was filed and one and a half years after the second. Defendant asserts that the intervals between the prior suits and this incident preclude any inference that the prior suits were a motivating factor behind his charging Plaintiff with misconduct. Furthermore, Defendant states that "[a]lthough Muhammad appealed these decisions [in the prior suits], there is nothing in the record showing that Officer Close was aware of Muhammad's appeals." (*Id.* at 12.) Defendant therefore asserts that Plaintiff has failed to establish a causal connection.

In his response to Defendant's summary judgment motion on this issue, Plaintiff has not presented any affirmative evidence other than the Plaintiff's own deposition testimony where he stated that there has been a "constant problem between me and him from 1994, from the time he chose to involve hisself [sic] with my litigation with other officers." (Pl.'s Dep., Dkt. 75 at Ex. 1.)

In *Smith v. Campbell*, 250 F.3d 1032 (6th Cir. 2001), the plaintiff claimed that he was transferred in retaliation for the grievances he filed against prison officials. With regard to the third element of the *Thaddeus-X* standard, the only valid connection plaintiff put forth concerning retaliatory motive was the fact that he was transferred only days after he informed his counselor that he was gathering documentation to file a grievance and a lawsuit.[4] *Id.* at 1038. The Sixth Circuit affirmed the district court's grant of summary judgment for defendants, stating:

> Aside from [the counselor's] statements, the temporal proximity between Smith filing his grievances and the decision to transfer him provides some circumstantial support for a causal connection. However, the Court concludes that this evidence alone is not sufficient to meet Smith's burden to show that the filing of grievances was a substantial or motivating factor for his transfer.

Id.

I suggest that in this case, as in *Smith*, the temporal proximity connection alone is insufficient to survive a motion for summary judgment. First, in this case the time frame between the protected conduct and the alleged retaliatory act is not a matter of days, but of years. It is entirely plausible that Defendant Close had no idea that Plaintiff had filed appeals of the prior lawsuits, and Plaintiff has not refuted that claim. *See Matsushita*, 475 U.S. at 587-88 (stating that in determining whether the moving party has met its considerable burden, a court may consider the plausibility of the moving party's evidence).

---

[4]The plaintiff also claimed that his counselor's alleged statement that the prison could transfer him at any time and say it was based on institutional needs supported the inference of retaliatory motive, but the Sixth Circuit rejected that notion because the counselor was not the decisionmaker with regard to the transfer. *Id.* at 1038.

Moreover, like in *Smith*, the temporal proximity claim is the sole support for Plaintiff's claim that Defendant Close acted with retaliatory animus, as apparently no statements from Defendant or others were adduced in discovery which could serve as evidence to put before a jury to satisfy this element.

e. Conclusion

I therefore suggest that, faced now with the Defendant's well-supported motion for summary judgment, Plaintiff has failed to come forward with evidence on which a jury could reasonably find that Defendant Close retaliated against Plaintiff because of his prior lawsuits. Although Plaintiff has met one element of a retaliation claim, and his *pro bono* counsel has vigorously advocated Plaintiff's position, the evidence on the other two elements is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 251-52. Accordingly, I suggest that Defendant's motion for summary judgment be granted.

Because I have suggested that Plaintiff has failed to present sufficient evidence to survive summary judgment, the alternate grounds for summary judgment presented in Defendant's motion shall not be addressed.

III. REVIEW

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further

right of appeal. *See Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. *See Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

CHARLES E. BINDER
United States Magistrate Judge

DATED: August 15, 2001

Copies to: Ms. Wendy Davis Kanar, Attorney at Law, 414 Townsend St., P. O. Box 632, Midland, MI 48640
Mr. Kevin Himebaugh, Assistant Attorney General, Corrections Division, P. O. Box 30217, Lansing, MI 48909
Honorable David M. Lawson, United States District Judge

ORIGINAL

No. 02-9065

Supreme Court, U.S.
FILED
MAY 12 2003
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In the Supreme Court of the United States

Shakur Muhammad, aka John E. Mease,

Petitioner.

v

Mark Close,

Respondent.

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION AND APPENDIX

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Should this Court grant certiorari to correct a harmless procedural error that did not affect the final outcome of this case and will have no precedential value for future cases?

II. Petitioner asserts that the Court of Appeals misapplied the "favorable termination" rule, which was set forth by this Court in *Heck v. Humphrey*, 512 U.S. 477 (1994). Should this Court grant certiorari when there are several other alternative grounds for affirming the district court's decision to dismiss Petitioner's action?

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BASIS FOR JURISDICTION

This is a civil rights action brought under 42 U.S.C. § 1983. The district court had subject matter jurisdiction because Petitioner raised a federal question. 28 U.S.C. § 1331. The Court of Appeals had appellate jurisdiction because Petitioner appealed from a final decision of the district court, which granted summary judgment in favor of Respondent. 28 U.S.C. § 1291. This Court has jurisdiction to review the judgment of the Court of Appeals. 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is a civil rights action brought *pro se* under 42 U.S.C. § 1983. Petitioner, who is a Michigan state prisoner, filed his complaint on June 2, 1998. Respondent is a corrections officer employed by the Michigan Department of Corrections. Petitioner claims that Respondent instigated a confrontation with him in the dining hall that resulted in Petitioner being found guilty of a major misconduct violation, albeit a lesser violation than the one charged by Respondent.[1] Petitioner claims that Respondent's actions were in retaliation against two previous lawsuits that Petitioner had filed against Respondent, along with several other MDOC employees. (App. p. 48a). The incident in the instant case occurred two and a half years after the first lawsuit was filed and nearly one and a half years after the second lawsuit. (App. p. 61a).

Respondent filed a motion to dismiss and/or for summary judgment on July 31, 1998. The magistrate judge recommended denying the motion. (App. p. 1a). The district court adopted the report and recommendation. (App. p. 46a). Petitioner then filed an amended complaint.

On October 19, 1999, the magistrate judge appointed pro bono counsel for Petitioner. Significant discovery then proceeded. On August 3, 2000, Respondent filed a motion to dismiss, which was based on failure to exhaust administrative remedies. The magistrate judge recommended denying the motion. The district court adopted the report and recommendation.

---

[1] Petitioner was charged with "Threatening Behavior," which is defined as "words, actions or other behavior which expresses an intent to injure or physically abuse another person. Such misconduct includes attempted assault and battery." Michigan Department of Corrections Policy Directive 03.03.105, Attachment B, p. 1. The hearing officer found Petitioner guilty of "Insolence," which is defined as "words, actions, or other behavior which is intended to harass, degrade or cause alarm in an employee." *Id.*, at p. 3. Although both are considered major misconduct violations, only Threatening Behavior is "non-bondable," meaning that the prisoner immediately goes to administrative segregation pending the administrative hearing.

On February 6, 2001, which was after discovery had closed, Respondent filed a second motion for summary judgment. Respondent also filed a supplement to the motion. Petitioner filed a response and Respondent replied. The magistrate judge recommended granting Respondent's motion for summary judgment. The sole reason for the magistrate judge's recommendation was that Petitioner failed to come forward with sufficient evidence in support of his retaliation claim. In this report and recommendation, the magistrate judge made no recommendations regarding the issue in *Heck v. Humphrey*, 512 U.S. 1 (1998). (App. p. 47a). In *Heck*, this Court held that a § 1983 plaintiff cannot recover damages if such recovery would render a conviction invalid, unless the conviction had been set aside. Petitioner filed objections *pro se* because his counsel filed a motion to withdraw. The district court adopted the report and recommendation. As with the magistrate judge, the district judge's analysis focused solely on the fact that Petitioner failed to present sufficient evidence to support his retaliation claim. *Heck* was not mentioned in the opinion. (App. p. 65a).

Petitioner then filed a timely notice of appeal. On appeal, Petitioner argued that the district erred when it decided that Petitioner failed to set forth sufficient evidence in support of the causation element of his retaliation claim. Petitioner argued that there were disputed issues of material fact that should have precluded summary judgment. In his response brief, Respondent addressed the issue raised by Petitioner. In addition, Respondent asserted alternative grounds for affirming the district court's decision, including *Heck*.

On September 23, 2002, the Court of Appeals issued an unpublished order affirming the district court's decision. (App. p. 72a). The Court of Appeals declined to address whether the district court correctly decided that Respondent was entitled to summary judgment because Petitioner failed to come forward with sufficient evidence to support his claim. Rather, the Court

of Appeals affirmed on an alternative ground, namely, that the case fell directly within the doctrine of *Heck v. Humphrey* because Petitioner sought to have the misconduct charge expunged from his file.

Petitioner then filed a petition for rehearing. On November 14, 2002, the Court of Appeals denied the petition for rehearing. (App. p. 74a). On February 11, 2003, Petitioner filed a timely petition for a writ of certiorari. After Respondent filed a waiver form, the Clerk of the Court requested Respondent to file a response.

REASONS FOR DENYING THE PETITION

I. Whether or not the Court of Appeals correctly decided the *Heck* issue is irrelevant because that issue was not dispositive of this case.

Petitioner's first question presented asserts that the Court of Appeals misconstrued the relief sought (i.e., whether Petitioner sought to have his misconduct violation expunged). Petitioner's second question presented asserts that the Court of Appeals misapplied the *Heck* analysis. These two questions are interrelated and will therefore be addressed together.

The procedural waters of this case are somewhat murky. In his original complaint, Petitioner sought to have the misconduct charge expunged from his file. But Petitioner later filed an amended complaint, which sought damages only. In its analysis, the Court of Appeals focused on the relief sought in the original complaint. Because it determined that Petitioner was seeking to have the misconduct charge expunged from his file, the Court of Appeals held that Petitioner's action was barred by *Heck v. Humphrey, supra*, 512 U.S. at 486-87, where this Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

The doctrine in *Heck*, known as the "favorable termination" rule, was applied to prison disciplinary proceedings in *Edwards v. Balisok*, 520 U.S. 641 (1997).

The main issue presented by Petitioner is whether the favorable termination rule should apply when a prisoner is no longer in custody. In his petition for a writ of certiorari, Petitioner asserts that "[t]here is clear conflict in the circuit courts regarding the application of the *Heck* rule after *Spencer* [*v. Kemna*, 523 U.S. 1 (1998)] and Petitioner believes it imperative that this

Court decide this issue." (Petitioner's brief, p. 10). While there may be some merit to Petitioner's assertion that there is disagreement among the circuits, granting certiorari in the instant case would not resolve the issue. As discussed more fully in the next section, the instant case was resolved on summary judgment. In other words, the district court dismissed Petitioner's action because Petitioner could not factually support his claim. *Heck* had nothing to do with the district court's decision. The procedural posture of this case was somewhat confused as the result of the Court of Appeals using *Heck* as an alternative ground for affirming the district court's decision. The Court of Appeals did not hold that the district court erroneously granted summary judgment. Rather, the Court of Appeals simply chose not to address this fact-intensive issue.

Further complicating the instant case is that the main issue presented in the Petition was not addressed by the district court, namely, that *Heck* was misapplied by the Court of Appeals in *Huey v. Stine*, 230 F.3d 226 (6th Cir. 2000). Respondent raised the *Heck* issue in his first motion for summary judgment, which was denied by the district court. In its first report and recommendation, the magistrate judge did a detailed analysis of the *Heck* issue. (App. pp. 23a-29a). In fact, the magistrate judge recommended that *Heck* did not apply because Petitioner was no longer "in custody." The magistrate judge based this conclusion on its interpretation of *Spencer v. Kemna*, 523 U.S. 1 (1998).

After the first report and recommendation was adopted by the district court, the Court of Appeals issued its *Huey* decision. In *Huey*, the Court of Appeals held "that *Heck* is not made inapplicable to [the plaintiff's] claim by the unavailability of habeas relief." *Huey*, 230 F.3d at 230. The *Huey* court determined, even in light of *Spencer*, that the favorable termination rule applies even if a prisoner is no longer in custody. This was contrary to the conclusion reached

previously by the magistrate judge in the instant case. The magistrate judge and district court never analyzed Petitioner's claims under the new law announced by *Huey*, however, because the basis for the district court's final decision in the instant case was simply that Petitioner failed to sufficiently support his retaliation claim. In other words, the issue regarding whether *Heck* applies to a prisoner who is no longer in custody was never fully developed below. The incomplete and messy procedural posture of the instant case makes it a poor candidate for certiorari review.

In short, the ultimate resolution of this case rested on basic summary judgment principles, not *Heck*. And this was not the only available ground for dismissing Petitioner's action. For example, because the district court decided the instant case on the merits, it did not make a decision on Respondent's claim of qualified immunity, which could have also been a reason for dismissing Petitioner's action. The qualified immunity issue would have also been completely independent from the *Heck* issue. Yet another issue is whether Petitioner properly exhausted his claim as required by 42 U.S.C. § 1997e(a). Again, these alternative grounds for dismissing Petitioner's action show that the accuracy of the Court of Appeals' analysis of the *Heck* issue does not affect the ultimate resolution of this case.

Even if this Court were to make a ruling on the *Heck* issue that departs from the Sixth Circuit's view that *Heck* applies even when a prisoner is no longer in custody, the result of the instant case would not change because there were several other grounds for dismissing Petitioner's action, including the ground relied upon by the district court, which was that Petitioner failed to factually support his claim. If this Court's decision on the *Heck* issue were to have any impact on the instant case, then this Court would have to wade through the procedural

and factual morass of the instant case and determine that the numerous alternative grounds did not support dismissing Petitioner's action.

Finally, Petitioner actually *is* still in custody. Although Petitioner is no longer in administrative segregation, he is still serving time in prison. Moreover, Petitioner's conviction of the Insolence major misconduct ticket resulted in a loss of good time credits. In other words, Petitioner is serving a longer sentence as a result of his misconduct conviction. Because the major misconduct ticket resulted in an increase in his sentence, Petitioner should be considered "in custody" until he is released from prison, not just when he is released from administrative segregation. Because Petitioner did not get his conviction reversed on direct appeal or otherwise set aside, the instant lawsuit does, in fact, affect the length of Petitioner's sentence. Petitioner could have appealed his misconduct conviction even after he was released from administrative segregation. Habeas-type relief was therefore not foreclosed merely because Petitioner was released from administrative segregation. Petitioner is claiming that he would not have been found guilty had Respondent not "set him up" by allegedly instigating a confrontation. Thus, success on Petitioner's claim would imply the invalidity of the major misconduct conviction, which is barred by *Heck* and *Edwards, supra*.

In sum, the instant case would be an exceedingly poor candidate for deciding the issue of whether *Heck* applies when a prisoner is no longer in custody. First, there were alternative grounds for dismissing Petitioner's action. Because the *Heck* analysis was not even necessary for the district court's decision, a ruling by this Court on the issue would essentially be an advisory opinion. Federal courts, however, lack the power to issue advisory opinions. *United States National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 446 (1993). Second, Petitioner was in custody and remains in custody. Consequently, Petitioner was

not barred from seeking review of his misconduct conviction merely because he had already been released from administrative segregation. Thus, the petition for a writ of certiorari should be denied.

II. The Court of Appeals correctly affirmed the District Court's decision to grant summary judgment because Petitioner failed to sufficiently support his claim.

As discussed above, the instant case was decided by the district court without considering the *Heck* issue. This is manifestly evident since the Petitioner essentially asks this Court to correct an alleged error regarding the granting of summary judgment. It is not, however, the role of this Court to simply correct errors of the lower courts. Moreover, even if this Court chose to correct errors in individual cases, this case is not a good candidate for such review because the district court correctly granted summary judgment and the Court of Appeals correctly affirmed.

The disposition of this case at the district court level was based on retaliation law in the Sixth Circuit. Prisoner claims alleging First Amendment retaliation are analyzed under the *en banc* court's decision in *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999). In *Thaddeus-X*, the Court of Appeals held that: (1) the plaintiff was engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two–that is, the adverse action was motivated at least in part by the plaintiff's protected conduct. *Id.* at 394.

The magistrate judge's second report and recommendation focused on the second and third prongs of the *Thaddeus-X* test. Regarding the adverse action prong, the magistrate judge concluded that the evidence was entirely one-sided in favor of Respondent. (App. pp. 58a-59a). Petitioner failed to present sufficient evidence in support of his allegation that Respondent instigated an incident, then filed a trumped-up misconduct charge. Regarding the causation prong, the magistrate judge concluded that the protected conduct (filing lawsuits) occurred too long before the alleged adverse action to support an inference of causation. (App. p. 61a).

Although the district court did not disagree with the magistrate judge on the adverse action prong, the district court found that Respondent's arguments against the causation prong were much stronger, and therefore dispositive of the case. (App. p. 69a). In short, the district court concluded that temporal proximity was not sufficient to establish causation and that there was a lack of affirmative evidence to support Petitioner's claim.

Missing from both the magistrate judge's second report and recommendation and the district court's opinion was any mention of *Heck v. Humphrey*, *Edwards v. Balisok*, or *Huey v. Stine*, or any discussion whatsoever about the favorable termination rule. Such a discussion was simply not necessary because the claims could be dismissed on the merits. In other words, this was a straightforward application of basic summary judgment principles, as guided by the First Amendment retaliation law of the Sixth Circuit. In sum, the correct result was reached by the lower courts in the instant case, regardless of whether *Heck* applies when a prisoner is no longer in custody.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: May, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SHAKUR MUHAMMAD, #213302,
aka John E. Mease,

Plaintiff,

v.

MARK CLOSE,

Defendant.

CIVIL ACTION
NO. 98-CV-10153-BC

DISTRICT JUDGE ROBERT H. CLELAND
MAGISTRATE JUDGE CHARLES BINDER

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANT'S RULE 12(b) MOTION FOR DISMISSAL AND RULE 56(b) MOTION FOR SUMMARY JUDGMENT (Dkt. 9), **AND PLAINTIFF'S MOTION TO AMEND COMPLAINT** (Dkt. 15.)

I. RECOMMENDATIONS

For the reasons set forth below, **IT IS RECOMMENDED** that Plaintiffs Motion to Amend Complaint be **GRANTED.**

After review and consideration of the pleadings, I conclude that: (1) the Plaintiff has stated a cause of action alleging the violation of rights protected by the United States Constitution; (2) the Defendant is not entitled to qualified immunity; and (3) the Plaintiff's claim is not barred by United States Supreme Court precedent. Accordingly, **IT IS RECOMMENDED** that the prayer for dismissal contained in Defendant's motion be **DENIED.**

After review and consideration of the entire record presently before the Court, I conclude that there are disputed material issues of fact relating to Defendant's intent at the time he issued misconduct charges against Plaintiff, and that Defendant is not entitled to qualified immunity. Accordingly, **IT IS RECOMMENDED** that the prayer for summary judgment contained in Defendant's motion **BE DENIED.**

II. REPORT

A. INTRODUCTION and FACTS

Pending, pursuant to an Order of Reference from United States District Judge Robert Cleland, (Dkt. 6), is Defendant Close's Rule 12(b) Motion for Dismissal and Rule 56(b) Motion for Summary Judgment. (Dkt. 9). Plaintiff filed a Motion in Opposition to Defendant's Motion for Dismissal/Summary Judgment. (Dkt. 16). Also pending is Plaintiffs Motion to Amend the Complaint. (Dkt. 15). Upon review of the pleadings, I conclude that pursuant to E.D. Mich. LR 7.1(e)(2), this motion is ready for Report and Recommendation without oral argument.

Plaintiff filed this prisoner civil rights complaint under 42 U.S.C. § 1983, claiming that "Defendant framed Plaintiff in retaliation for the Plaintiff's exercise of his First Amendment rights." (Compl., Dkt. 3 at 4B). The incident occurred on May 21, 1997, while Plaintiff was incarcerated in general population at Standish Maximum Facility ("SMF"). Plaintiff alleges that Defendant Close, a corrections officer employed by SMF, instigated an incident with Plaintiff, and then wrote Plaintiff up for misconduct arising out

of the incident, all with the intent of retaliating against Plaintiff for filing two previous civil rights lawsuits against the Defendant and others, as well as for filing SMF grievances against the Defendant. At the time of the incident, an appeal was pending with the Sixth Circuit in one of those §1983 cases.[1]

Regarding the incident in question, Plaintiff alleges that while he was eating breakfast in the dining area, he noticed Defendant Close staring at him. Plaintiff continued to eat, but when he looked up again, Defendant was still staring. At this time, Plaintiff began to stare back. Plaintiff alleges that Defendant then "made a fighting stance" towards him. (Compl., Dkt. 3 at 4A). Plaintiff turned away to drink his coffee, and then noticed that Defendant was "coming into the dining area at a fast pace with his face contorted." (*Id.*) Plaintiff, feeling threatened by Defendant's body language and fast approach, stood up and walked towards the Defendant. Plaintiff alleges that when "Defendant and Plaintiff came within a foot of one another, Defendant stated, 'What's up,' while staring angerly [sic] at Plaintiff. Plaintiff did not respond." Plaintiff was then handcuffed by two other officers and taken to a detention cell. (*Id.*)

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[1] Plaintiff filed a Prisoner Civil Rights case in this court against 14 defendants, including Defendant Close, in 1994 (Case No. 94-CV-7493-DT). Summary judgment for defendants was granted by U.S. District Judge Anna Diggs Taylor on August 18, 1995, and the appeals court dismissed Plaintiff's appeal for want of prosecution in March of 1996. In February, 1996, Plaintiff filed another Prisoner Civil Rights case against five defendants, including Defendant Close (Case No. 96-CV-100053-BC). Judgment was entered for defendants by U.S. District Judge Robert H. Cleland on December 24, 1996, and Plaintiff filed an appeal with the Sixth Circuit Court of Appeals in February of 1997. The appeals court affirmed the decision of the district court on February 9, 1998.

Following this incident, Defendant Officer Close filed a Major Misconduct Report charging Plaintiff with the major rule violation of "Threatening Behavior."[2] Defendant described the confrontation in his report:

> At 0744 while watching 3 block chowlines, I made direct eye contact with prisoner Mease-X []. Mease-X contorted his face and made a statement that I believe was directed at me but I could not understand him over the room noise. I then walked into the chow hall to speak with Mease, I then noticed Mease-X was angerly [sic] walking towards me and looked very hostile, I Immediately stopped. Mease kept walking and stopped approximatly [sic] 2 inches from my face, starring [sic] directly into my eyes and breathing heavily on my face. This officer was in fear of being physically assulted [sic] and or injured. Mease's face was contorted with veins buldging [sic] at his temples. At this point Officer Metevia immediatly [sic] handcuffed Mease-X and escorted him to unit Z.

(Pl.'s Exhibits, Dkt. 14, Ex. A at 2). The Report also stated that Plaintiff Mease's "Status Pending Hearing" was "Non-Bond List," and stated that "prisoner was placed on (illegible)[3] because of above misconduct." (*Id.*)

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[2] "Threatening Behavior" is a major rule violation defined as: "Words, actions or other behavior which expresses a intent to injure or physically abuse another person. Such misconduct includes attempted assault and battery." MDOC P.D. 03.03.105, Attachment B at 2. It is a "[m]andatory 'nonbondable' charge." *Id.* at 1. The Policy Directive lists the following as common examples of Threatening Behavior: "Threats of sexual assault made by one prisoner to another prisoner; writing threatening letters to another person; threats made to a third person which are intended to place the person threatened in fear of harm." *Id.* at 2.

[3] I believe that the report states that Plaintiff was placed on "T-Lock," which would be short for "toplock." This would be consistent with the MDOC's policy directive stating that "the reviewing officer shall order the prisoner to be confined in segregation or on toplock pending a formal hearing if the charge is nonbondable . . . ." MDOC P. D. 03.03.105(J)(5). Toplock means that a prisoner is restricted to his own cell, room or bunk and bunk area. He "shall not leave his cell, room or bunk area for any reason without specific authorization from the appropriate staff person." MDOC P.D. 03.03.105(X)(2).

Six days after the incident, a Major Misconduct Hearing was held. Plaintiff was found not guilty of Threatening Behavior. (*Id.* at 1.) After reading witness statements from both inmates and officers, the hearing officer reduced the charge to Insolence.[4] Plaintiff was found guilty of Insolence. Plaintiff was given the disciplinary sanctions of seven days detention and thirty days loss of privileges for the violation. (*Id.*)

Plaintiff states that he "suffered physically as he was subjected to 43 days of unjust loss of his liberty and . . . suffers mental and emotion [sic] anguish as a result of Defendant's threatening conduct and retaliatory disciplinary punishment." (Compl., Dkt. 3 at 4B). He requests relief in the form of: (1) $4,300 in compensatory damages; (2) $5,000 in punitive damages for physical and mental injuries; and (3) his record expunged of the misconduct charge because "Defendant used the prison disciplinary process to retaliate." (*Id.* at 4.)

Defendant Close filed the instant motion, (Def.'s Mot., Dkt. 9), arguing that the complaint must be dismissed because *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997), bars Plaintiff's § 1983 claim. Alternatively, Defendant argues that the finding of guilt on the misconduct charge defeats Plaintiffs claim that the ticket

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[4] "Insolence" is also classified as a major rule violation. Its definition is: "Words, actions, or other behavior which is intended to harass, or cause alarm in an employee." *Id.* at 3. It is not, however, a mandatory nonbondable charge. Common examples of Insolence are: "Abusive language, writing or gesture directed at an employee." *Id.*

was retaliatory and an abuse of authority. Finally, Defendant asserts that he is entitled to qualified immunity. An affidavit by Defendant Close is included with the motion.

Plaintiff filed a Motion in Opposition to Defendant's Motion for Dismissal/Summary Judgment, (Pl.'s Response, Dkt. 16), disputing each of the three legal arguments made by Defendant. In addition, Plaintiff argues that summary judgment should not be granted because Plaintiff has not had the opportunity to pursue discovery. *(Id.* at 16.) Plaintiff's response also includes an affidavit by Plaintiff Muhammad.

On the same day that Plaintiff filed his Response, he also filed a Motion and Affidavit to Amend Plaintiff's § 1983 Complaint. (Pl.'s Mot. to Amend, Dkt. 15). Plaintiff seeks to amend two paragraphs of his complaint. The Defendant did not file a response to Plaintiff's Motion to Amend.

B. ANALYSIS AND CONCLUSIONS

1. Plaintiff's Motion to Amend Complaint

Rule 15 of the Federal Rules of Civil Procedure governs amendments of pleadings. It reads:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

FED. R. CIV. P. 15(a).

In this case, Defendant had responded to Plaintiff's original complaint prior to the filing of the motion to amend, so the applicable standard is that leave to amend the complaint shall be "freely" granted if "justice so requires."

Plaintiff seeks to amend the portion of his complaint which states that he was subjected to 43 days of unjust loss of his liberty" (quoted more fully above) to read that he". .was subjected to 7 days of unjust loss of his liberty . . . ." (Pl's Mot. to Amend, Dkt. 15 at 1). He further moves to amend the section on relief. Instead of requesting that his record be expunged and specifying a separate dollar amount for compensatory and punitive damages, he moves to request relief as follows: "Plaintiff requests $10,000.00 in compensatory and punitive damages for the physical and emotional injuries sustained as a result of defendant's retaliatory conduct." *(Id.* at 2.)

Plaintiff states that the two changes he requests "will not in any way prejudice the defendant or effect any of the defenses alleged by the defendant. The . . . amendments only seek to more accurately state the relief sought by plaintiff in his § 1983 complaint and will be in the interest of a just and sound judicial process." (*Id.*) He further "attests that the errors made in his § 1983 complaint arose from his lack of experience in the legal articulation of the relief he seeks for the violation of his constitutional rights by the defendant." (*Id.*)

Defendants did not file a response to Plaintiff's Motion to Amend. L.C.R. 7.1(d)(2)(B) states that "[a] response to a nondispositive motion must be filed within 14 days after service of the motion."

It is my assumption that Plaintiff's desire to change "43 days loss of liberty" to only "7 days" is an effort to correct a mischaracterization of the 30 days loss of privileges he received, as a "loss of liberty." His other proposed amendment is a change to the relief he is requesting. Since Plaintiff is not seeking to add or change any factual allegations, and considering that Defendant has not registered any opposition to the Motion to Amend, I conclude that the Defendant would not be prejudiced by this Court's allowing the Plaintiff to amend his Complaint. Moreover, a *pro se* litigants' pleadings are to be held to a less stringent standard than pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); *Brooks v. Seiter*, 779 F.2d 1177, 1180 (6th Cir. 1985).

I therefore suggest that the Motion to Amend be granted.

2. Defendant's Motion to Dismiss or for Summary Judgment

a. Motion Standards

Defendant moves for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, or for summary judgment under Fed. R. Civ. P. 56(c). When deciding a motion to dismiss for failure to state a claim under 12(b)(6), "[t]he court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *Cline v. Rogers*, 87 F.3d 176 (6th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 510, 136 L. Ed. 2d 400 (1996)(citing *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993)). "While this standard is decidedly

liberal, it requires more than the bare assertion of legal conclusions." *DeLorean*, 991 F.2d at 1240 (citing *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). However, *pro se* litigants' pleadings are held to a less stringent standard than pleadings drafted by lawyers. *Brooks v. Seiter*, 779 F.2d 1177, 1180 (6th Cir. 1985).

Defendant's motion also included a prayer for summary judgment. A motion for summary judgment will be granted under Fed. R. Civ. P. 56(c) where there is no genuine issue of material facts, and the moving party is entitled to judgment as a matter of law. All facts and inferences must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case. *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)(citing *Celotex Corp. v Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The moving party thus bears a considerable burden. The Court of Appeals for the Sixth Circuit has held that a

> District Court may grant a motion for summary judgment only if it finds from the whole record before it that there are no material facts which are in dispute. It may not make findings of disputed facts on a motion for summary judgment. The movant has the burden of showing conclusively that there exists no genuine issue as to a material fact and that the evidence together with all inferences to be drawn therefrom must be considered in the light most favorable to the party opposing the motion. The movant's papers are to be closely scrutinized while those of the opponent are to be viewed indulgently.

Watkins v. Northwestern Ohio Tractor Pullers Assn., 630 F.2d 1155, 1158 (6th Cir. 1980) (citations omitted). *See also, Ghandi v. Police Dept. of Detroit*, 747 F.2d 338 (6th Cir. 1984).

Summary judgment is proper when the moving party shows that the non-moving party, after sufficient discovery, is unable to meet its burden of proof. *Celotex*, 477 U.S. at 326. However, to defeat the motion, the non-moving party cannot rest merely on the pleadings alone. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505. 191 L. Ed. 2d 202 (1986). It is the plaintiff's obligation to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Celotex*, 477 U.S. at 324. Not every issue of fact or conflicting inference presents a genuine issue of material fact requiring the denial of summary judgment. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48 (1986). Irrelevant and unnecessary facts should have no bearing on a trial court's determination on a motion for summary judgment. *Id.* at 248. Accordingly, only germane facts that go to the heart of the party's suit deserve consideration. The courts will not entertain metaphysical doubts as material facts to defeat the motion. *Matsushita*, 475 U.S. at 586.

As a general rule, "[p]rison administrators should be accorded wide-ranging deference in the adoption and execution of policy and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). "As long

as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him and are not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montanye v. Haymes*, 427 U.S. 236, 96 S. Ct. 2543, 49 L. Ed. 2d 466 (1976).

b. Motion to Dismiss

Two of Defendant's three claims are appropriately considered under the dismissal standard: whether Defendant is entitled to qualified immunity and whether Plaintiffs claim is barred by *Heck* and *Balisok*. The Sixth Circuit has recently stated that before a court can consider whether a defendant is entitled to qualified immunity, it "must first examine whether the [plaintiff] ha[s] properly alleged a cause of action." *Block v. Ribar*, 156 F.3d 673, 678, 683 (6th Cir. 1998)("Because the proper order of consideration begins with the determination of whether a violation of a constitutional right occurred, and then proceeds to a consideration of the defense, we will begin our analysis with the former, then discuss [the] defense of qualified immunity."). I therefore will consider whether Plaintiff has properly alleged a cause of action for retaliation prior to discussing the defense of qualified immunity.

i. Cause of Action for Retaliation

Plaintiff brings his retaliation action under 42 U.S.C. § 1983. The essential elements of a § 1983 claim are that the conduct complained of (1) was committed by a person acting under color of state law and (2) deprived the plaintiff of rights, privileges,

and immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor, 451* U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327, 106 S. Ct. 677, 88 L. Ed. 2d 662 (1986). Absent either element, a § 1983 claim will not lie. *Christy v. Randlett,* 932 F.2d 502, 504 (6th Cir. 1991). It is not disputed that Defendant Close was acting under the color of state law as a corrections officer when the incident took place and the misconduct report was filed, therefore the first element is met. Regarding the second element, Plaintiff asserts that his constitutional rights were violated by Defendant when Defendant allegedly retaliated against him for filing previous lawsuits and grievances.

When a prison official retaliates against a prisoner for exercising his First Amendment rights to file a lawsuit or a grievance, it can be a violation of the substantive due process rights of the prisoner. *See Jackson-El v. Winsor,* 986 F. Supp. 440 (E.D. Mich. 1997); *Cale v. Johnson,* 861 F.2d 943 (6th Cir. 1988). In order to prevail on a claim of retaliation, plaintiff must show that retaliation was a substantial or motivating factor in defendant's conduct. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

In 1988, the Sixth Circuit reviewed a case where the plaintiff prisoner alleged that correction officers had framed him and then filed disciplinary charges against him in retaliation for exercise of his First Amendment rights. In *Cale v. Johnson,* 861 F.2d 943 (6th Cir. 1988), the court tackled the issue of what standard to apply to determine whether defendant's conduct rose to the level of a due process violation. The court began by

quoting the general principle that the "'[t]est for substantive due process claims is whether defendants' conduct "shocks the conscience."'" *Id.* at 949 (quoting *McMaster v. Cabinet for Human Resources,* 824 F.2d 518 (6th Cir. 1987)(quoting *Rochin v. California,* 342 U.S. 165 (1952))). The court went on to recognize that in at least one case, "however, this court has recognized that an 'egregious abuse of governmental power' may be sufficient to state a claim based on the violation of substantive due process.'" *Id.* (citing *Vinson v. Campbell County Fiscal Ct.,* 820 F.2d 194, 201 (6th Cir. 1987)). The *Cale* court, in reversing the district court's grant of summary judgment for defendants, did not apply the "shocks the conscience" standard when it concluded that

> the evidence supports a claim that [defendant] intentionally and maliciously framed [plaintiff] Cale and filed disciplinary charges against him in retaliation for Cale's exercise of his first amendment rights. This alleged conduct constitutes an egregious abuse of authority within the meaning of *Vinson.*

Id. at 950 (emphasis added).

In 1995, Judge Hood considered the legal standards to be applied in a retaliation action. In *Riley v. Kurtz,* 893 F. Supp. 709, 716 (ED. Mich. 1995), she stated that cases holding that "the means of retaliation must be an 'egregious abuse of government power' or 'shock the conscience'" are wrong. Instead, the court found that "[w]illful violations of enumerated constitutional guarantees are constitutional torts, and nothing more need be shown. . . . It is only when dealing with one of the unenumerated portions of substantive due process that some plus factor, such as 'shocks the conscience,' is required to define the conduct as a constitutional tort." *Id.* at 717-18.

In June of 1997, the Sixth Circuit decided another retaliation case. In *McLaurin v. Cole*, 115 F.3d 408 (6th Cir. 1997), a prisoner plaintiff appealed a district court's judgment as a matter of law for defendant, a corrections officer, following the plaintiff's proofs at trial. The Sixth Circuit stated: "Though McLaurin argues that the facts alleged need not be shocking to the conscience because his claim is grounded on first amendment principles, **this court has repeatedly demanded that retaliation claims arising from the exercise of First Amendment rights be shocking to the conscience."** *Id.* at 410 (footnote omitted)(emphasis added). Interestingly, the *McLaurin* court then cited five cases as support for that statement. The first case it cited was *Cale v. Johnson*, discussed *supra*, which mentioned the "shocks the conscience" test, but actually used the "egregious abuse of governmental power" test in its decision. The other four cases cited are all unpublished opinions. Of those four, only two mentioned the "shocks the conscience" test, and one of those two used an either/or approach ("plaintiff has not shown that the defendants' conduct constitutes an egregious abuse of governmental power or that such action otherwise shocks the conscience"). *Id.* at 410-11.

The *McLaurin* court went on to affirm the district judge's grant of judgment as a matter of law because the plaintiff had not proven that the misconduct report defendant wrote against him was motivated by a desire to retaliate, and additionally because the defendant's actions were not shocking to the conscience. *Id.* at 411.

Circuit Judge Ryan wrote a concurring opinion in *McLaurin*, essentially agreeing with Judge Hood's reasoning in *Riley*. He first explained that there are two types of substantive due process:

> [A]s this court has . . . held, there are two distinct categories of substantive due process rights, and only one of them implicates the "shocks the conscience standard:
>
> > Substantive due process claims are of two types. The first type includes claims asserting denial of a right, privilege, or immunity secured by the constitution or by federal statute other than procedural claims under "the Fourteenth Amendment simpliciter."
> >
> > The other type of claim is directed at official acts which may not occur regardless of the procedural safeguards accompanying them. The test for substantive due process claims of this type is whether the conduct complained of "shocks of the conscience" of the court.

Id. at 412 (quoting *Mertik v. Blalock*, 983 F.2d 1353, 1367 (6th Cir. 1993)). Judge Ryan explained that the

> important analytical difference between the two varieties of substantive due process claims should amply illustrate why the "shocks the conscience" standard is not appropriately applied in the type of claim implicated here. The "shocks the conscience" standard developed as a safeguard against frivolous substantive due process claims of this ill-defined, non-enumerated, generalized variety. Only this category of generalized substantive due process claims not rooted in any specific enumerated provision of the Bill of Rights need meet the "shocks the conscience" standard in order to survive dismissal.
>
> And the logic of this is apparent. **If a plaintiff has adequately alleged a willful violation of, for example, the First Amendment, it simply makes no sense for the court to require further that the particular unconstitutional action in question be one that is shocking to the conscience of the court.**

Id. at 412 (emphasis added). Finally, Judge Ryan discussed the majority opinion:

> The majority declares that *Cale v. Johnson* supports the application of the shock-the-conscience test, but this is incorrect. First, *Cale* **does not hold that the shocks-the-conscience test is the appropriate standard for that case; it simply mentions that standard in passing,** as a dictum. But second, and more importantly, *Cale* is not a "retaliation" case in the sense that this case is a retaliation case. The plaintiff's claims in *Cale* were founded on the second type of substantive due process . . . . There was no suggestion that the guard's action in *Cale* was taken in retaliation for the plaintiff's attempt to gain access to the courts or utilize the administrative grievance process, or any other exercise of a First Amendment right. **I know of no published authority from this court relying on Cale for the proposition that the shocks-the-conscience standard is appropriately applied in First Amendment retaliation claims;** the majority's reliance on unpublished case law may be interesting as an academic matter, but those cases simply do not have the weight of authority.

Id. at 412-13 (citations and footnotes omitted)(emphasis added). Judge Ryan concluded by agreeing with the outcome of the majority's opinion, however, because he too believed that plaintiff had not presented any evidence to suggest the misconduct ticket was motivated by a desire to retaliate. *Id.* at 413.

In this case, I suggest that the correct standard to be applied to determine if Defendant's alleged conduct rose to the level of a violation, and therefore whether Plaintiff has adequately pleaded a cause of action, is whether the conduct "shocks the consciences of the court. Although the reasoning of Judge Hood and Judge Ryan is compelling, the fact remains that binding Sixth Circuit precedent requires the "shocks the conscience" standard to be applied. *See McLaurin v. Cole,* 115 F.3d 408, 410 (6th Cir. 1997). I further suggest that "framing" a prisoner in retaliation for the exercise of his First Amendment rights is a severe abuse of governmental power which is shocking to the conscience. *See Jackson-El v. Winsor,* 986 F. Supp. 440, 443-44 (E.D. Mich. 1997).

Plaintiff has alleged that Defendant provoked the incident and charged Plaintiff with an inflated violation with the intention of retaliating against Plaintiff for his exercising his constitutional rights. I suggest that this alleged conduct "shocks the conscience" of the court, and therefore Plaintiff has stated a cognizable claim of retaliation. Dismissal pursuant to Rule 12(b)(6) is therefore inappropriate unless the Defendant is entitled to qualified immunity or the claim is barred by *Heck* and *Balisok.*

ii. Qualified Immunity

The Defendant asserts that he is entitled to qualified immunity. The Supreme Court defined the doctrine by stating that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The Sixth Circuit recently discussed the "sometimes confusing doctrine" of qualified immunity:

> The confusion in this area is generated in part by carrying over an absolute immunity construct into a qualified immunity analysis. When an official is cloaked with absolute immunity, it matters not what he did, when he did it or what the state of the law was then and now. Such is not the case with qualified immunity.

Kain v. Nesbia, 156 F.3d 669, 672 n.5 (6th Cir. 1998). The court there explained:

> When making a qualified immunity analysis, it is important to remember that the defendant is, in essence, saying: "If the plaintiff's version is credited, what I did, judged today, arguendo would be wrongful, but at the time I acted, no reasonable officer would have known he was acting wrongfully." *See Berryman v. Rieger,* 150 F.3d 561, 562 (6th Cir. 1998) ("the defendant must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the

> plaintiff's case"). If an officer committed no wrong, then qualified immunity is not implicated.

Kain, 156 F.3d at 671-72.

The Sixth Circuit has also held that there is a "heightened pleading" requirement in cases where the defendant claims qualified immunity. In *Veney v. Hogan*, 70 F.3d 917 (6th Cir. 1995), the court held that a plaintiff must respond to a defense of qualified immunity with "specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity." *Id.* at 922. The court reasoned that it can be argued that this "heightened" standard is not really a departure from Rule 8[5] of the Federal Rules of Civil Procedure at all, but rather is exactly what the drafters of the rule envisioned. *Id.* at 921-22. The court also explained that if the defense of qualified immunity is "raised by the individual defendant by a motion for summary judgment, it would follow that the burden by the plaintiff would be a heightened production of summary judgment documentation under Rule 56." *Id.* at 922, n.5. The *Veney* court found that the plaintiff in that case did not meet the heightened standard because he

> fail[ed] to indicate the precise content and form of the complaints and challenges, the context in which they were made, and when and to whom they were made. Furthermore, . . . the complaint does not allege wrongdoing by any particular defendant. It is this sort of inchoate, generalized form of pleading that fails to convey to the district court the

[5] Rule 8 in relevant part states that: "A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." FED. R. Civ. P. 8(a)(2).

> information it needs to determine whether a defendant is entitled to qualified immunity.

Id. at 922.

The *Kain* court described the progression of a Sixth Circuit case involving a qualified immunity defense. First, the plaintiff must adequately state his claim under the notice pleading requirements of Rule 8. If the defendant responds with the defense of qualified immunity, "then, at this point, plaintiff's complaint does not meet the heightened pleading requirement we enunciated in *Veney*[.]" *Kain*, 156 F.3d at 672. Plaintiff must come forward with specifics such as what happened, who was involved, when it happened, and the context in which it happened. If these factual allegations, taken as true, do not rise to the level of a constitutional violation, then the "claim would be subject to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure or summary judgment. It would not be necessary to make a qualified immunity analysis." *Id.* If, however, plaintiff adequately responds by raising a constitutional violation, "then the qualified immunity analysis would have to be made." *Id.*

I suggest first that Plaintiff has met the Sixth Circuit's "heightened pleading" requirement. Plaintiff has given a very specific account of what he alleges happened in the dining area, as well as giving the case numbers of the previous lawsuits filed against Defendant which provide the context for the incident. He has included the names of those present, as well as statements given by them. Also included with his pleadings are copies of the Major Misconduct Report, the hearing report, and MDOC policy directives relevant

to this case. I therefore suggest that dismissal for lack of pleading specificity is inappropriate. As a result, as mandated by *Kain*, I suggest that qualified immunity analysis must be undertaken.

There are two steps that a district court must take when qualified immunity is raised in a motion to dismiss. First, the court must determine, as a purely legal matter, if the "allegations state a claim of violation of clearly established law[.]" *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86L. Ed. 2d 411 (1985); *see also Siegert v. Gilley*, 500 U.S. 226, 231, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991). Second, the court must decide if "the public official acted 'objectively unreasonable in light of [the] established constitutional right[].'" *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998)(quoting *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994)). This determination is necessary because it answers the "legal question of whether the defendant should have known that his alleged acts violated clearly established rights at the time." *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987).

To find a clearly established constitutional right, a district court in the Sixth Circuit must find binding precedent "from the Supreme Court, the Sixth Circuit, or from itself." *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992). A district court may look finally to the decisions of other circuits. *Buckner v. Kilgore*, 36 F.3d 536 (6th Cir. 1994). The Supreme Court has explained that the right an official has allegedly violated must have been clearly established in a particularized sense. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates

that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). This ensures that government officials can reasonably "anticipate when their conduct may give rise to liability for damages." *Id.* at 639 (citing *Davis v. Scherer*, 468 U.S. 183, 195, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984)).

In November of 1997, Judge Duggan decided a summary judgment motion in a § 1983 retaliation case where the defendants argued they were entitled to qualified immunity on the grounds that "the law of retaliation was not clearly established because courts could not agree on the appropriate standard to be applied in such cases, and a prison official would not be on notice of exactly what conduct constitutes retaliation." *Jackson-El v. Winsor*, 986 F. Supp. 440, 443 (E.D. Mich. 1997). As evidence of the confused state of the law, defendants specifically pointed to Judge Hood's "willful violation" standard utilized in *Riley*, compared with *Cale's* mentioning of both the "shocks the conscience" and "egregious abuse of governmental power" tests. *Id.* Judge Duggan stated:

> In 1988, the Sixth Circuit indicated in *Cale* that a prison guard's retaliatory act must constitute an egregious abuse of governmental power to be actionable. Defendants acknowledge that the Sixth Circuit has never "abdicated" the *Cale* analysis. Furthermore, *Riley* was decided in 1995, long after the conduct allegedly occurred in this case, and the Sixth Circuit noted in *McLaurin* that it "has repeatedly demanded that retaliation claims arising from the exercise of First Amendment rights be shocking to the conscience." For these reasons, the Court is satisfied that as of 1993, when the incidents allegedly occurred, it was clearly established that a "shocks the conscience" approach was utilized in the Sixth Circuit.
>
> In addition, even if there was some dispute in the courts whether a "shocks the conscience," or a more liberal (to plaintiffs) "willful violation" approach should be employed, that dispute has no impact on this case. *Cale* **clearly held that the "framing" of a prisoner in retaliation for the**

> **exercise of his First Amendment rights was a severe abuse of governmental power.** . . . Conduct that was unlawful under the "shocks the conscience" standard would certainly remain unlawful under a "willful violation' standard. Therefore, **defendants were on notice that their alleged conduct was unlawful, even if they were unsure about the standard that would be used to analyze their conduct.**

Id. at 443-44 (citations and footnotes omitted)(emphasis added).

I suggest that the law of retaliation was clearly established at the time of the incident in question. As Judge Duggan reasoned, even if the appropriate *standard* to apply in First Amendment retaliation cases was not settled in this circuit, the wrongfulness of the conduct was. Moreover, the law was clearly established outside of this circuit as well. The Supreme Court has stated that the rule that the First Amendment bars retaliation for protected speech has "long been clearly established." *Crawford-El v. Britton*, __ U.S. __, 118 S. Ct. 1584, 1594, 140 L. Ed. 2d 759 (1998)("Even when the general rule has long been clearly established (for instance, the First Amendment bars retaliation for protected speech) . . ."). Likewise, the Second Circuit has stated that "the proscription of retaliation for a plaintiff's exercise of First Amendment rights has long been established." *Dobosz v. Walsh*, 892 F.2d 1135, 1141-42 (2d Cir. 1989). Therefore, I suggest that Plaintiff's allegations adequately state a violation of clearly established law.

The second question of law to be determined at this stage is whether a reasonable public official would have understood that the alleged conduct violated the plaintiff's rights. If a reasonable corrections officer should have known, then the defendant is not entitled to qualified immunity. Considering the volume of retaliation cases that have been

decided at all levels of the federal courts over the past ten years, I suggest that Defendant was on notice and should have known that his alleged conduct was unlawful.

In conclusion, I suggest that Defendant is not entitled to dismissal on the grounds of qualified immunity. Whether Defendant is entitled to summary judgment on this issue is discussed in section II.B.2.c.ii., *infra*.

iii. Heck & Balisok

Defendant's remaining argument for dismissal is that Plaintiff's action is barred by the Supreme Court's holdings in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), and *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997).

In *Heck v. Humphrey* the Supreme Court addressed the issue of whether a state prisoner may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983. The Court expressed concern that a prisoner could bring a § 1983 action in an effort to do an end run around the exhaustion requirements of habeas corpus, or could use a civil rights suit to develop factual findings in a federal court that could be issue preclusive on subsequent state actions challenging the fact or duration of confinement. To address those concerns, the Court concluded that a damages claim that calls into question the lawfulness of a conviction or confinement is not cognizable under § 1983. The Court held that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove

> that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus[.]

Heck, 512 U.S. at 486-87(footnotes omitted). The Court went on to explain the initial inquiry that must be made when such a claim is brought before the federal courts:

> [T]he district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 487(footnotes omitted). Examples of situations where "the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff" were provided by the Court. *Id.* One example is where an illegal search was conducted that yielded inculpatory evidence which, instead of being suppressed, was admitted as evidence at trial due to the application of either the doctrine of independent source or inevitable discovery. *Id.* at 487 n.7. In a situation such as this, a prisoner could bring a § 1983 suit for damages for the illegal search, prevail in that suit, and still not imply the invalidity of his conviction because the rules of evidence allowed for the conviction in spite of the constitutional violation. The Court explained that in such a case, however, the "plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury, which . . . does not encompass the 'injury' of being convicted and imprisoned[.]" *Id.* (citations omitted).

Four justices, including Justice Ginsburg, joined Justice Scalia in the majority opinion in *Heck*. Justice Souter filed a concurring opinion in *Heck* that was joined by three other justices. He agreed with the new "favorable termination" rule, but disagreed with the majority's readiness to have it apply as an "element" of every § 1983 case. He argued that it should not apply to persons who were not "in custody" and thus had no habeas remedy, even if a favorable § 1983 judgment would suggest the invalidity of that individual's prior state conviction. If it were applied to those plaintiffs, then

> the result would be to deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling. The reason . . . is that individuals not "in custody" cannot invoke federal habeas jurisdiction, the only statutory mechanism besides § 1983 by which individuals may sue state officials in federal court for violating federal rights. That would be an untoward result.

Heck, 512 U.S. at 500.

In 1997, the Supreme Court extended the holding of *Heck* to § 1983 claims for damages by prisoners alleging a violation of their rights in a prison disciplinary procedure which led to punishment (such as toplock, administrative segregation, or loss of good time credits). *In Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 1589, 137L. Ed. 2d 906 (1997), the court held that a prisoner's civil rights suit for damages based on allegations of bias of the prison's disciplinary hearing officer was not cognizable under § 1983 because a decision in the prisoner's favor would necessarily imply the invalidity of the discipline imposed.

Heck's "favorable termination" rule continued to evolve in Supreme Court jurisprudence. In *Spencer v.Kemna*, __ U.S. __, 118 S. Ct. 978, 989, 140 L. Ed. 2d 43 (1998), Justice Ginsburg abandoned Justice Scalia's five justice majority opinion in *Heck* and joined the reasoning of Justice Souter's *Heck* concurrence. Justice Ginsburg stated: "I have come to agree with Justice SOUTER's reasoning: Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within § 1983's 'broad reach.'" *Id.* at 990. She added, "'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.'" *Id.* (quoting *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600, 69 S. Ct. 290, 293, 93 L. Ed. 259 (1949)(Frankfurther, J., dissenting)).

Thus, it is now clear that five justices of the Supreme Court would limit *Heck* and its progeny to petitioners who attempt to bring a § 1983 action directly or indirectly challenging a conviction or disciplinary matter when such plaintiffs are "in custody" and have an available federal remedy in habeas corpus.

Defendant argues that "[b]ecause plaintiff here claims that the misconduct ticket he received was retaliatory, he is thus 'imply[ing] the invalidity of the punishment imposed' upon him, and his claim 'is not cognizable under § 1983.' Therefore, this complaint should be dismissed." (Def.'s Mot., Dkt. 9 at 3 (quoting *Balisok*).)

I suggest however, that, in light of *Spencer,* there simply is not a *Heck/Balisok* issue present when a plaintiff brings a § 1983 claim when he or she is no longer "in custody."

When applying *Heck/Balisok/Spencer* to the prison context, where there has been no deprivation of good-time credits and the inmate has served whatever period of time in segregation or toplock that was imposed by the hearing officer, there is no concern that a § 1983 action could be used as an end run on the habeas exhaustion requirement or for issue-preclusive effects to force a state court to reach a conclusion that the disciplinary hearing was invalid. Thus, the reasons for applying a "favorable termination rule" are not present.

In this case, the sanctions Plaintiff received from the hearing officer were 7 days of detention and 30 days loss of privileges. These were given in punishment for the violation of Insolence. Since Plaintiff agrees that he was guilty of Insolence, these call only be considered to the extent that Plaintiff asserts he would not have been insolent but for the Defendant's provocation. However, the six days of mandatory pre-hearing toplock Plaintiff experienced as a result of being charged with a nonbondable offense are definitely in issue, and this sanction had been served by the time Plaintiff commenced his § 1983 action. Thus, he was not "in custody" in the relevant sense of *Spencer* that would allow him to bring a habeas corpus action with respect to the alleged provocation of the incident and wrongful pre-hearing detention.[6]

---

[6] Plaintiff clearly is still "in custody" with respect to his original conviction. However, he is no longer in the more restrictive custody of toplock or administrative segregation, nor in the more extended custody that would still face him had he lost any good-time credit. Thus, he is not "in custody" within the meaning of 28 U.S.C. § 2254 and could not bring a habeas action with respect to his misconduct ticket and its sanction.

Based on the foregoing analysis, I suggest that *Heck* and *Balisok* are inapplicable to the instant case and therefore do not bar Plaintiffs § 1983 action.

Alternatively, even if Justice Ginsburg had not changed her position in *Spencer*, the Plaintiff argues that the *Heck/Balisok* rule would not preclude his case. He states:

> [P]laintiff argues that his claim is not barred by [*Balisok*] or *Heck* as he is not attempting to attack the validity of the charge he was found guilty of on 5-27-97 (026 Insolence), but instead is alleging that he was framed and falsely charged for the offence of threatening behavior for which he was found unambiguously not guilty.
>
> * * *
>
> In this case, defendant falsely charged plaintiff with conduct the plaintiff did not perform and the prison hearing officer found that "[t]he resident made no threats of physical injury or specific threats of assault," as alleged by defendant. Therefore, a finding in this case that defendant framed plaintiff for disciplinary action in retaliation for the exercise of his First Amendment rights would not necessarily imply the invalidity of the 5-27-97 guilty finding of Insolence.

(Pl.'s Response, Dkt. 16 at 2,4.)

I suggest that the reasoning of Plaintiff is persuasive. The rule of *Heck* and *Balisok* (pre-*Spencer*) would not bar Plaintiff's case because the facts present one of the "exceptions" where a favorable outcome of the § 1983 action would not imply that the disciplinary hearing officer's finding was invalid. Plaintiff asserts that Defendant instigated an incident in an effort to frame Plaintiff, and then when Plaintiff did respond, Defendant wrote the misconduct ticket for a more severe charge than was necessary. The hearing officer's finding that the charge Defendant made was excessive and unsupported by the facts actually bolsters Plaintiff's claims in the instant action -- rather than being

diametrically opposed to them. Therefore, I suggest that, even if Justice Ginsburg's change of position was not considered, *Heck* and *Balisok* still would not prevent this case from proceeding. As a result, I suggest that on this ground, Defendant's Motion to Dismiss should be denied.

c. Motion for Summary Judgment.

i. Effect of Misconduct Hearing Finding

Defendant's third argument in his instant motion is that the finding of guilt on the related misconduct charge defeats Plaintiff's claim that the ticket was retaliatory and an abuse of authority. Since this issue necessarily concerns documents outside of the pleadings, I construe this as an argument in support of defendant's prayer for summary judgment. Defendant asserts that "[w]riting a major misconduct for violating the rules is not an egregious abuse of authority or shocking to the conscience," and that Plaintiff has failed to prove that Defendant "Close would not have written this ticket absent a motive to retaliate." (Def.'s Mot., Dkt. 9 at 4.)

The substantive question presented here is whether the Defendant has shown conclusively that there exists no genuine issue as to material fact regarding whether Plaintiff's right to substantive due process was violated. In making this determination, the court must consider all of the evidence presented, together with all inferences to be drawn therefrom, in the light most favorable to the Plaintiff.

There are many facts of this case on which both sides agree. All parties agree that Defendant initiated eye contact with the Plaintiff while Plaintiff was in the dining area, that

Defendant then entered the dining area and began walking toward Plaintiff, and that Plaintiff then stood up and walked toward Defendant. They came within inches of each other. No physical contact took place. Plaintiff was handcuffed and removed. Defendant wrote up a Major Misconduct Report charging Plaintiff with Threatening Behavior. A hearing was held where Plaintiff was found not guilty of Threatening Behavior, but was found guilty of Insolence.

Plaintiff further asserts facts that Defendant has not agreed with, but which this court is required to give credence to on a motion for summary judgment. Plaintiff alleges that Defendant was "staring continuously at him in an effort to intimidate him," and that "[w]hen plaintiff stared back at the defendant, defendant made a fighting stance and then approached plaintiff at a fast pace with his face contorted." (Pl.'s Response, Dkt. 16 at 8.) These facts, if proven true, could indicate that Defendant did "instigate" the confrontation. Plaintiff points to the statement of Defendant's Supervising Officer, Sergeant Tipton, as support for these assertions. Sgt. Tipton wrote out the following statement which was read at the misconduct hearing:

> While standing next to [Defendant] Close I observe[d] [Defendant] Close make a body movement by going forward and hunching his shoulders at the same time hold his arms out and hands facing (palms) upward. [sic] At this time [Defendant] Close started walking toward the table area were [sic] the prisoner were eating. At the same time [Plaintiff] Mease-X jump[ed] up and started walking directly towards [Defendant] Close. The two end up in each other face 1 inch apart. [sic] Just standing looking each other in the eyes. C/O Metevia then applied cuffs to [Plaintiff] Mease-X without incident. Mease-X was then excorted [sic] to Unit Two without incident. This writer asked [Defendant] Close why he went in the chow area in that manner - he

> stated he was just going to ask [Plaintiff] Mease-X why does he keeps on Marquetteing him. [sic]

(Pl.'s Exhibits, Dkt. 14, Ex. A at 5-6.) Sgt. Tipton's statement corroborates Plaintiff's assertions that Defendant made some out-of-the-ordinary body movements toward Plaintiff. I suggest that the inference which could be drawn therefrom is that Defendant purposely took these actions to provoke Plaintiff into jumping up to defend himself.

The Supreme Court has recently held that when a plaintiff brings a constitutional claim against a government official where proof of motive is an element, the trial court may not impose a heightened proof requirement which demands that a plaintiff must prove motive by clear and convincing evidence at the summary judgment stage. *Crawford-El v. Britton*, __ U.S. __, 118 S. Ct. 1584, 1595, 140 L. Ed. 2d 759 (1998). I suggest that Plaintiff has presented sufficient evidence to this court on the issue of intent to show that a material issue of fact is in dispute. As stated above, a rational trier of fact could infer from Sgt. Tipton's statement, in addition to Plaintiff's assertions, that Defendant Close intended to frame Plaintiff. It comes down to an issue of credibility, which cannot be decided by the court on a motion for summary judgment. *See Bloch v. Ribar*, 156 F.3d 673, 682 (6th Cir. 1998)("Accordingly, 'claims involving proof of a [defendant's] intent seldom lend themselves to summary disposition.'")

Defendant points to the cases of *McLaurin v. Cole*, discussed *supra*, and *Orebaugh v. Caspari*, 910 F.2d 526 (8th Cir. 1990), where the Eighth Circuit stated that "[n]o claim can be stated when the alleged retaliation arose from discipline for acts that a prisoner was

not entitled to perform." *Orebaugh*, 910 F.2d at 528. I suggest that these cases can be distinguished. In those cases the prisoners were found guilty of the charged misconduct. Here, Plaintiff was found not guilty of the charge the officer made against him, that being Threatening Behavior. The hearing officer specifically found that "[t]he resident made no threats of physical injury of specific threats of assault thus the charge is changed to Insolence." (Pl.'s Exhibits, Dkt. 14, Ex. A. at 1.)

In addition, Plaintiff's complaint is not solely based on the writing of the misconduct ticket as the act of retaliation. His complaint instead is two-fold: first, that Defendant instigated the entire confrontation to provoke Plaintiff, and second, when that plan was successful, Defendant then wrote Plaintiff up for a more severe violation, (one that required mandatory immediate detention), than was warranted by Plaintiff's actions. Plaintiff alleges that both of these acts were purposely taken in an effort to retaliate. Plaintiff does not dispute that he was guilty of Insolence. He admits that he stood up, ready to defend himself against what he perceived as an oncoming threat. Under Plaintiff s theory of the case, there would have been no misconduct report but for the provocation of Defendant. I therefore suggest that the hearing officer's finding that Plaintiff was guilty of Insolence does not defeat Plaintiff's claim that Defendant retaliated against him by provoking the incident and then charging Plaintiff with a more severe violation than was warranted. It is consistent with Plaintiffs claims.

The Sixth Circuit has held that "a District Court may grant a motion for summary judgment only if it finds from the whole record before it that there are no material facts

which are in dispute. It may not make findings of disputed facts on a motion for summary judgment." *Watkins v. Northwestern Ohio Tractor Pullers Assn.*, 630 F.2d 1155, 1158 (6th Cir. 1980)(citations omitted). I suggest that the disputed issue of Defendant's intent is material to the claim of retaliation, and is an issue of fact to be decided by the trier of fact at trial, not a matter of law to be determined by a court on a motion for summary judgment.

I also suggest that Plaintiff has sufficiently alleged, at this pre-discovery stage, a nexus between Plaintiffs asserting his First Amendment rights and the incident in question. Plaintiff has shown that this incident took place while the appeal was pending on Plaintiff's second lawsuit against Defendant. In addition, Plaintiff asserts that at this time he also had "initiated an institutional investigation including defendant on 5-16-97 of which Lt. J. Chudzinski had notified me was underway on 5-17-97." (Pl.'s Response, Dkt. 16 at 3.) Although Plaintiff has not presented conclusive proof to this court that there was a sufficient link between Plaintiff's filing of the lawsuits or prison investigation and Defendants alleged retaliatory conduct, Plaintiff is not required to prove at the summary judgment stage. The questions of whether Defendant performed the alleged acts, as well as whether retaliation was a substantial or motivating factor behind them, are questions for a jury.

In conclusion, I suggest that there are at least three disputed issues of material fact present: (1) whether Defendant intentionally committed the act of instigating a confrontation with Plaintiff, (2) whether Defendant intentionally charged Plaintiff with a

more severe prison violation than was warranted, and (3) whether he did these alleged acts with the motivation to retaliate against Plaintiff for exercising his First Amendment rights. Therefore, I suggest that Defendant's summary judgment motion should be denied.

Therefore, I suggest that Defendant's summary judgment motion should be denied.

ii. Qualified Immunity

Defendant's motion was a combined one for dismissal and/or summary judgment, which raised qualified immunity generally as a defense. However, recent Sixth Circuit caselaw calls for compartmentalized analysis in the qualified immunity arena. Different questions are considered when qualified immunity is raised as grounds for dismissal versus when it is raised as grounds for summary judgment. The Supreme Court stated:

> Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law [so as to preclude dismissal], the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985). The Sixth Circuit quoted from this passage in the case of *Russo v. City of Cincinnati*, 953 F.2d 1036, 1043 (6th Cir. 1992), when it noted that, in the context of a motion for summary judgment, the court must decide the legal question of whether the plaintiff has presented "'evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.'"

In this case, although discovery has not yet taken place, it is relevant to note that Defendant has conceded that he committed the *acts* the Plaintiff has alleged, at least to a substantial degree. The *intent* behind those acts, however, is material to Plaintiffs claim

and is in dispute. Therefore, I suggest that summary judgment is inappropriate at this time, and that the case should proceed to the discovery stage.

III. REVIEW

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. section 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981), *Thomas v Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985), *Howard v. Secretary of HHS*, 932 F.2d 505 (6th Cir. 1991). The parties are advised that making some objections; but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. *Smith v. Detroit Fed'n. of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987), *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir. 1991). Pursuant to E.D. Mich. LR 72. 1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

CHARLES E. BINDER
United States Magistrate Judge

DATED: November 23, 1998

Copies to: Shakur Muhammad, #213302, Ionia Maximum Facility, 1576 W. Bluewater Highway, Ionia, MI 48846
Ms. Christine Campbell, Assistant Attorney General, Corrections Division, P.O Box 30217, Lansing, MI 48909
Honorable Robert H. Cleland, United States District Judge (Hand Delivered)

FILED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

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SHAKUR MUHAMMAD, #213302

Plaintiff,

v. Case No: 98-CV-10153-BC

MARK CLOSE,

Defendant.
_____/

ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. Introduction

This prisoner civil rights complaint, brought pursuant to 42 U.S.C. § 1983, is before the court on plaintiff's motion to amend the complaint and defendant's motion to dismiss and/or for summary judgment. The matter was referred to United States Magistrate Judge Charles E. Binder pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.1. The magistrate judge issued his report on November 24, 1998, recommending that the court grant plaintiff's motion to amend and deny defendant's motion to dismiss and/or for summary judgment. Defendant filed objections and plaintiff responded. Having reviewed the file, the magistrate's report, the objections and the response thereto, and having made a *de novo* review of the portions of the report to which plaintiff raised objections, the court determines that the findings and conclusions of the magistrate judge are correct and

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adopts the same for the purposes of this order.

II. Background

Plaintiff is a prisoner. (R&R at 2.) Over the course of his incarceration, plaintiff has filed a number of lawsuits and grievances against, among others, the defendant in the instant case--a corrections officer. (*Id.* at 2-3.) In the instant case, plaintiff alleges that as a result of exercising his First Amendment rights--through filing the lawsuits and the grievances--defendant retaliated by instigating a confrontation with plaintiff and then falsifying or exaggerating plaintiff's part in the incident. Defendant charged plaintiff in a misconduct report with "threatening behavior"--a mandatory nonbondable charge, (r&r at 4); plaintiff was later found not to have committed "threatening behavior" but was found to have committed "insolence"--not a mandatory nonbondable charge. (R&R at 5.) The relevant facts and positions of the parties are more fully laid forth in the magistrate judge's report and need not be repeated here.

III. Standard

The magistrate analyzed portions of defendant's motion under Rule 12 and portions under Rule 56 of the Federal Rules of Civil Procedure. Since the court will consider matters outside the

pleading, defendant's objections will by analyzed under Rule 56.[1] Fed. R. Civ. P. 12(b).

Under Rule 56, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). "Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record construed favorably to the non-moving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate." *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Summary judgment is not appropriate when "the evidence presents a sufficient disagreement to require submission to a jury." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The existence of some factual dispute does not defeat a properly supported motion for summary judgment; the disputed factual issue must be material.

The burden placed upon the movant for summary judgment is to show that the non-moving party has failed to establish an essential element of its case upon which the non-moving party would bear the ultimate burden of proof at trial. *Celotex Corp.*,

[1] The court notes, however, that the holding of this order would not change if the court analyzed defendant's objections under Rule 12(b) of the Federal Rules of Civil Procedure.

477 U.S. at 322. But the moving party need not support its motion with affidavits or other similar materials "negating" the opponent's claim. *Id.* at 323. Once the moving party meets this burden, the burden passes to the non-moving party to establish, after an adequate opportunity for discovery, the existence of a disputed factual element necessary to its case with respect to which it bears the burden of proof. *Id.* The non-moving party must show that there is sufficient evidence for a jury to return a verdict in its favor, *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989), i.e., that there is doubt as to the material facts and that the record, taken as a whole, does not lead to a judgment for the movant. *Id.* at 1478. The non-moving party must present affirmative evidence on critical issues. *Id.*

In regard to a magistrate's report and recommendation, the filing of timely objections to such a report requires the court to "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). See *Thomas v. Arn*, 474 U.S. 140, 142, 149 (1985), *reh'g denied*, 474 U.S. 1111 (1986); *Neuman v. Rivers*, 125 F.3d 315, 322-23 (6th Cir.), *cert denied*, __ U.S. __, 118 S. Ct. 631 (1997); *Howard v. Secretary of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981). In order to qualify as a proper objection, the objection must be

sufficiently specific to alert the reviewing court to the disputed issues. *Howard*, 932 F.2d at 509; *Walters*, 638 F.2d at 950. A generalized objection is the functional equivalent of a failure to object. *Howard*, 932 F.2d at 509.

IV. Discussion

Defendant raised five objections to the magistrate's report which the court will address seriatim.

A. Objection One

Defendant's first objection is that the magistrate's view of the facts is not sufficiently supported by the record. (Def. Br. at 1.) The magistrate determined that plaintiff pled facts sufficient to withstand defendant's motion. (R&R at 11-16, generally throughout). The court finds the magistrate's position correct.

Plaintiff presents evidence to create a genuine issue of material fact, *see Gutierrez*, 826 F.2d at 1536, as to whether defendant instigated and exaggerated an incident in retaliation. Aside from his compliant, plaintiff offers his own affidavit, dated September 14, 1998, which avers that defendant instigated the dining room incident and also alleges facts indicating that defendant's motive was retaliation. (Pl. Ex. 4.) Further, an affidavit of Zebadiah Holland, a fellow inmate, indicates that the correctional officers "continual [sic] to harass [plaintiff]." (Pl. Ex. 2.) The report from the hearing

investigator also contains evidence supporting plaintiff. The report offers statements from the following people: Bellows, an employee--"that was wrong on the officers part"; Jones-el, an inmate--"[t]hen the officer stepped in front of him"; and Screws, another inmate--"[defendant] started calling the guy all types of names." (Pl. Ex. A at 4.) In addition, Sergeant Tipton, who was standing next to defendant at the beginning of the incident explained that he "observe [sic] [defendant] make a body movement by going forward and hunching his shoulders [and] at the same time hold his arms out and hands facing (palms) upward." (Pl. Ex. A at 5.) Although defendant interprets this movement as a gesture of saying "'I don't know,'" (def. br. at 2), it could just as easily be interpreted as a gesture soliciting a fight.

Moreover, defendant argues that "the hearing officer found that it was *[p]laintiff* who came at [defendant] in an 'alarming manner'" (def. br. at 2)(emphasis in original); the court, however, finds defendant's use of this statement exaggerated. The hearing report actually indicates only that plaintiff "got up from his seat in an alarming manner," (pl. ex. A), not that plaintiff "came at" defendant in an alarming manner. Further, defendant's brief implies that the hearing report rules out instigating conduct by defendant. It does not. Rather, it merely describes the actions of plaintiff without making direct reference to the appropriateness or inappropriateness of

defendant's actions.

Contrary to defendant's assertions, the magistrate did not "concur with the [p]laintiff's claim that [defendant] 'instigated' the incident," (def. br. at 2), nor "redecid[e] the factual issues and find[] that [defendant] was at fault" (def. br. at 3); instead, the magistrate merely suggests that when the evidence is construed in plaintiff's favor it survives defendant's motion. The court agrees. Defendant's first objection is denied.

B. Objection Two

Defendant's second objection challenges the magistrate's application of plaintiff's different but related misconduct charge.[2] (Def. Br. at 3.) Stated otherwise, defendant argues that the magistrate should have applied *Orebaugh v. Caspari*, 910 F.2d 526 (8th Cir. 1990) in defendant's favor. However, besides the fact that *Orebaugh* is not controlling authority in this circuit, it is factually distinguishable from the instant case. The *Oregaugh* court explains that "[w]hile a prisoner can state a claim of retaliation by alleging that disciplinary actions were based upon false allegations, no claim can be stated when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform." *Id.* at 528. In

[2] As noted earlier, defendant filed a misconduct report against plaintiff charging "threatening behavior," but plaintiff was found only to have committed "insolence." R&R, *supra*, at 2.

Orebaugh, there was no averment by the plaintiff that the violation report did not correspond with the actions of the plaintiff. In the instant case the misconduct report was determined not to be an accurate description of what actually occurred. An exaggerated report--should it be proved exaggerated--could be construed as a false report. Further, in *Orebaugh*, unlike the instant case, there was no allegation that the defendant instigated the conduct. Defendant's second objection is denied.

C. Objection Three

Defendant's third objection is that, despite the magistrate's recommendation, there is no evidence to support a finding that the misconduct ticket was written in retaliation because there is too great a time period between the prior lawsuits and grievances and the dining room incident. (Def. Br. at 4.) Defendant relies heavily on *Bensen v. Cady*, 761 F.2d 335 (7th Cir. 1985)--another non-controlling and factually distinguishable case. In *Bensen*, the court indicated that the retaliation claim was an afterthought with inadequate factual support that should have been pled separately; *Bensen* spoke of only one lawsuit filed by the prisoner; and the *Bensen* plaintiff did not allege that the "retaliation" was in any way detrimental to him. *Id.* at 342. Moreover, the *Bensen* court merely indicated that "[t]he lengthy period of time [five months] between the

incident.

Second, defendant argues that there is insufficient evidence to show that he would have acted in the manner he did "but for" the plaintiff filing the lawsuits and grievances, relying again on the "lengthy period of time" discussion in *Benson v. Cady*, 761 F.2d 335, 342 (7th Cir. (1985). (Def. Br. at 5-6.) For the reasons previously discussed, the court determines that *Benson* does not prevent the finding that a genuine issue of material fact exists in the instant case sufficient to prevent summary judgment. Defendant's fourth objection is denied.

E. Objection Five

Defendant's fifth objection regards the magistrate's suggestion that plaintiff should be allowed to amend his complaint. Defendant generally argues that plaintiff's claim for monetary damages is barred by the Prison Litigation Reform Act because plaintiff suffered no physical injury. (Def. Br. at 6.) Defendant's objection, however, is nebulous. It is unclear whether (1) defendant is objecting to a finding of the magistrate or (2) defendant is arguing that plaintiff's motion to amend should be denied or (3) defendant is, for the first time, presenting a motion to dismiss the complaint based on the remedy sought by plaintiff.

The only reference by defendant to the magistrate's report is an observation by defendant that the magistrate cited

plaintiff's motion to amend. (Def. Br. at 6.) Because defendant does not allege specific error on the part of the magistrate and because the overall nature of the objection is vague, defendant's fifth objection is a generalized objection which is the functional equivalent of a failure to object. *Howard*, 932 F.2d at 509.

Moreover, plaintiff did allege some physical injury in both the original and amended complaint. Defendant's concerns regarding physical injury could been brought in a response to plaintiff's motion to amend the complaint. As noted by the magistrate, however, defendant simply failed to respond. (R&R at 8.) Further, a *pro se* civil rights complaint is governed by less stringent standards and should be dismissed only if "'it appears beyond doubt that the plaintiff[] can prove no set of facts which would entitle [him] to relief.'" *Brooks v. Seiter*, 779 F.2d 1177, 1180 (6th Cir. 1985). The court cannot say with certainty, based on defendant's affirmation, that plaintiff without a doubt suffered no physical injury. Additionally, plaintiff's original complaint seeks to have his prison record expunged; although plaintiff's motion to amend is unclear on this point, it is still possible that plaintiff seeks some relief other than monetary damages.

Furthermore, if defendant's argument constitutes a new motion to dismiss and/or for summary judgment based on

plaintiff's requested remedy, it is not proper to raise such a claim for the first time in objections to the magistrate's report. Defendant's fifth objection is denied.

V. Conclusion

Accordingly, IT IS ORDERED that the Magistrate Judge's Report and Recommendation is hereby ADOPTED.

IT IS FURTHER ORDERED that plaintiff's motion to amend the complaint is hereby GRANTED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is hereby DENIED.

Robert H Cleland

ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

March 26, 1999

- M/J Binder
- Shakur Muhammad
- Campbell

3-26-99

KRichards

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SHAKUR MUHAMMAD,
aka John B. Mease,

Plaintiff,

v.

MARK CLOSE,

Defendant.

CIVIL ACTION
NO. 98-CV-10153-BC

DISTRICT JUDGE DAVID M. LAWSON
MAGISTRATE JUDGE CHARLES BINDER

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANT CLOSE'S RULE 56(b) MOTION FOR SUMMARY JUDGMENT
(Dkt. 73)

I. RECOMMENDATION

For the reasons set forth below, **IT IS RECOMMENDED** that Defendant's motion for summary judgment be **GRANTED.**

II. REPORT

A. INTRODUCTION and FACTS

Pending, pursuant to a general case management Order of Reference from United States District Judge Robert Cleland,[1] (Dkt. 6), is Defendant Close's motion for summary judgment.

[1] Pursuant to Administrative Order 00-AO-045, issued August 22, 2000, United States District Judge David M. Lawson assumed responsibility for the Bay City docket effective September 5, 2000.

Plaintiff filed a response brief (Dkt. 75) and Defendant filed a reply (Dkt. 76). Upon review of the pleadings, I conclude that pursuant to E.D. Mich. LR 7. 1(e)(2), this motion is ready for Report and Recommendation without oral argument.

Plaintiff filed this prisoner civil rights complaint under 42 U.S.C. § 1983, claiming that "Defendant framed Plaintiff in retaliation for the Plaintiffs exercise of his First Amendment rights." (Compl., Dkt. 3 at 4B.) The incident in question occurred on May 21, 1997, while Plaintiff was incarcerated in general population at Standish Maximum Facility ("SMF"). Plaintiff alleges that Defendant Close, a corrections officer employed by SMF, instigated an incident with Plaintiff, and then filed an inflated misconduct charge against him, all with the intent of retaliating against Plaintiff for filing two previous civil rights lawsuits against Defendant Close and others, as well as for filing SMF grievances against Defendant.

Specifically, Plaintiff alleges that while he was eating breakfast in the dining area, he noticed Defendant Close staring at him. Plaintiff continued to eat, but when he looked up again, Defendant was still staring. At this time, Plaintiff began to stare back. Plaintiff alleges that Defendant then "made a fighting stance" towards him. (Compl., Dkt. 3 at 4A.) Plaintiff turned away to drink his coffee, and then noticed that Defendant was "coming into the dining area at a fast pace with his face contorted." *(Id.)* Plaintiff, feeling threatened by Defendant's body language and fast approach, stood up and walked towards the Defendant. Plaintiff alleges that when "Defendant and Plaintiff came within a foot of one another, Defendant stated, 'What's up,' while staring angerly [sic] at Plaintiff. Plaintiff did not respond." Plaintiff was then handcuffed

by two other officers and taken to a detention cell. *(Id.)*

Following this incident, Defendant Close filed a Major Misconduct Report charging Plaintiff with the major rule violation of "Threatening Behavior."[2] Six days after the incident, a Major Misconduct Hearing was held and Plaintiff was found not guilty of Threatening Behavior. *(Id.* at 1.) After reading witness statements from both inmates and officers, the hearing officer reduced the charge to Insolence.[3] Plaintiff was found guilty of Insolence. Plaintiff was given the disciplinary sanctions of seven days' detention and thirty days' loss of privileges for the violation. *(Id.)*

B. PROCEDURAL HISTORY

Plaintiff filed this action on June 2, 1998. The complaint alleges, first, that Defendant instigated the confrontation to provoke Plaintiff, and second, that when that plan was successful, Defendant then wrote Plaintiff up for a more severe misconduct violation, (one that required mandatory immediate detention), than was warranted by Plaintiff's action. Plaintiff alleges that

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[2] "Threatening Behavior" is a major rule violation defined as: "Words, actions or other behavior which expresses an intent to injure or physically abuse another person. Such misconduct includes attempted assault and battery." MDOC P.D. 03.03.105, Attachment B at 2. It is a "[m]andatory 'nonbondable' charge." *Id.* at 1. The Policy Directive lists the following as common examples of Threatening Behavior: "Threats of sexual assault made by one prisoner to another prisoner; writing threatening letters to another person; threats made to a third person which are intended to place the person threatened in fear of harm. *Id.* at 2.

[3] Insolence" is also classified as a major rule violation. Its definition is: "Words, actions, or other behavior which is intended to harass, or cause alarm in an employee." *Id.* at 3. It is not, however, a mandatory nonbondable charge. Common examples of Insolence are: "Abusive language, writing or gesture directed at an employee." *Id.*

both of these acts were purposely taken in an effort to retaliate against him for exercising his constitutional right to file lawsuits.

In July 1998, Defendant Close filed his initial motion for dismissal and/or summary judgment on the following grounds: (1) that *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997), barred Plaintiffs claim; (2) that the finding of guilt on the misconduct charge defeated Plaintiff's claim that the ticket was retaliatory and an abuse of authority; and (3) that Defendant was entitled to qualified immunity. (Dkt. 9.) This Court recommended denial of the motion in a Report and Recommendation ("R&R") dated November 24, 1998. The R&R suggested that, when construing the allegations found in the complaint as true and viewing them in the light most favorable to Plaintiff, there were three issues of material fact in dispute: (1) whether Defendant intentionally committed the act of instigating a confrontation with Plaintiff; (2) whether Defendant intentionally charged Plaintiff with a more severe prison violation than was warranted; and (3) whether he did these alleged acts with the motivation to retaliate against Plaintiff for exercising his First Amendment rights. Judge Cleland adopted the Report and Recommendation on March 26, 1999, over Defendant's objections. (Dkt. 22.)

Subsequently, Plaintiff was appointed counsel and the parties engaged in discovery. Defendant Close then brought a motion for dismissal on two grounds: (1) that Plaintiff failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a); and (2) that Plaintiff failed to allege a physical injury as required by the PLRA, 42 U.S.C. § 1997e(e). On November 2, 2000, this Court recommended denial of the

motion (Dkt. 68), and on January 12, 2001, Judge Lawson adopted the Report and Recommendation over Defendant's objections. (Dkt. 71.)

Defendant Close now brings another motion for summary judgment, asserting that "after discovery, the above three issues [of material fact] have been resolved in Officer Close's favor and that there is no reasonable dispute that necessitates putting these questions before a jury." (Def. 's Mot., Dkt. 73 at 3.)

C. ANALYSIS AND CONCLUSIONS

1. Motion Standards

A motion for summary judgment will be granted under Rule 56(c) of the Federal Rules of Civil Procedure where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. All facts and inferences must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89L. Ed. 2d 538 (1986). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact as to an essential element of the non-movant's case. *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In determining whether the moving party has met its considerable burden, a court may consider the plausibility of the moving party's evidence. *See Matsushita*, 475 U.S. at 587-88.

To defeat the motion, the non-moving party cannot rest merely on the pleadings alone. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 191 L. Ed. 2d 202 (1986).

The non-moving party has an obligation to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Celotex*, 477 U.S. at 324. After examining the evidence, the court then determines "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1310 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 251-52). Summary judgment will not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

2. Retaliation Claim

a. Governing Law

When the first motion for summary judgment in this case was decided, the standard applicable to claims of retaliation for the exercise of First Amendment rights was not all that clear in the Sixth Circuit. *(See* R&R dated 11/24/98 at 12-17.) In March of 1999, however, the Sixth Circuit clarified the standard to be applied in the case of *Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999) (en banc). The *Thaddeus-X* standard is now applicable to this case. See *Herron v. Harrison*, 203 F.3d 410, 414 (6th Cir. 2000) (reversing district court's dismissal of prisoner's First Amendment retaliation claim because *Thaddeus-X* controlled even though it was decided eight months after district court dismissed the case).

In *Thaddeus-X*, the court confirmed that "government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial

part by a desire to punish an individual for exercise of a constitutional right." *Thaddeus-X*, 175 F.3d at 386. The court clarified that there are three elements to a claim of retaliation based on the exercise of a specific constitutional right:

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two — that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.

Id. at 394.

The first element requires that the plaintiff show that he engaged in conduct protected by law. The court explained that when a retaliation claim is brought by a prisoner, this element must take into consideration the plaintiff's incarcerated status:

> [I]t is generally much harder for a prisoner to show that his conduct is protected because prison regulations are allowed to infringe on prisoners' rights as long as they are rationally related to a legitimate penological concern. *See Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96L. Ed. 2d 64 (1987). Therefore, if a prisoner violates a legitimate prison regulation, he is not engaged in "protected conduct," and cannot proceed beyond step one.

Thaddeus-X, 175 F.3d at 395.

The term "adverse action" in the second element is derived from retaliation cases arising in the public employment context. In those cases, adverse action could include discharge, refusal to hire, or failure to promote. *Id.* at 396. In the prison context, the court explained,

> an action comparable to transfer to administrative segregation would certainly be adverse. In order to determine whether actions of lesser severity merit being deemed "adverse" for purposes of a retaliation claim, we adopt the standard suggested by Judge Posner in *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982),

> that an adverse action is one that would "deter a person of ordinary firmness" from the exercise of the right at stake.

Thaddeus-X, 175 F.3d at 396.

The third element -- a causal connection between the protected conduct and the adverse action -- begins with the plaintiff bearing the "burden of establishing that his protected conduct was a motivating factor behind any harm." *Id.* at 399.

b. First Element — Protected Conduct

In this case, Defendant Close does not dispute that Plaintiff has met the first element of a retaliation claim. Plaintiff claims that he was retaliated against because he named Defendant Close as a defendant in two prior lawsuits. It is well established that prisoners have a constitutional right of access to the courts, *see Bounds v. Smith*, 430 U.S. 817, 821-24, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), and therefore Plaintiff has alleged that he engaged in protected conduct.

c. Second Element — Adverse Action

Plaintiff claims that the adverse action taken against him consisted of Defendant Close provoking him by coming into the dining area with a contorted look on his face after staring and making a "fighting stance" outside the window, and then, when Plaintiff reacted, Defendant "purposely overcharg[ing] Plaintiff with a nonbondable offense in order to ensure that he received toplock prior to his hearing." (Pl's Resp., Dkt. 75 at 8.) Defendant Close asserts and this Court agrees that both issues — whether he instigated the confrontation and whether he inflated the misconduct charge — relate to the second prong of the *Thaddeus-X* standard. (Def. 's Mot., Dkt. 73 at 3.) As a threshold matter, I suggest that these acts as alleged would rise to the

level of "adverse action" contemplated by the *Thaddeus-X* standard because being wrongfully charged with a non-bondable major misconduct violation and therefore placed in toplock could deter a person of ordinary firmness from continuing to engage in protected conduct. See *Thaddeus-X*, 175 F.3d at 396 ("an action comparable to transfer to administrative segregation would certainly be adverse."). However, the question presented by a summary judgment motion following discovery is not whether Plaintiff has stated a claim, but "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker*, 879 F.2d at 1310.

Defendant contends that, although Plaintiffs allegations are sufficient to survive a dismissal motion, he is entitled to summary judgment because discovery has not uncovered any evidence that he provoked Plaintiff by making a "fighting stance" as Plaintiff claimed in his complaint. Defendant states: "Before discovery, it was not clear whether Officer Close instigated the confrontation with Muhammad. Based on the deposition testimony, however, there is no longer any reasonable dispute over this issue." *(Id.)*

Defendant points to the deposition testimony of Corrections Officer Richard Metevia, Resident Unit Manager Darlene McIntire, and of Plaintiff himself in support of this position, drawing attention to the fact that the testimony is consistent with Defendant's contention that he did not make a "fighting stance," but rather that he thought Plaintiff was trying to say something to him through the glass so he simply made a "what do you want" gesture by raising his palms up. Officer Metevia was standing next to Defendant Close at the glass while they were looking

into the dining area, and described the gesture made by Defendant:

Q . . . Did you observe Mark Close making any motions towards the prisoner before he went into the chow area?

A Seemed like Mease said something and Close went, I can't hear you, whatever, you know, through the glass between them.

Q Now, I just realized we made a gesture, and the court reporter can't record that. Could you describe the gesture in words?

A Like palms up, "what did you say," you know.

Q So you lifted your lower arms up, and leaving the upper arms at your sides, you've lifted your lower arms up, palms up?

A Yeah.

(Metevia Dep., Dkt. 73, Ex. 3 at 19-20.) Officer Metevia also testified that from his observations, it did not appear that Defendant Close instigated a confrontation with Plaintiff. *(Id.* at 21.) Similarly, Resident Unit Officer Darlene McIntire, who was on duty in the dining area at the time of the incident, testified at her deposition that she witnessed Defendant Close come into the "chow hall" and stop, and "then Mease just walked in further and further, came right up into his face." (McIntire Dep., Dkt. 73 at Ex. 7.)

Defendant also contends that Plaintiffs own deposition testimony is consistent with Defendant's version of what happened:

A . . . He made this gesture towards me like this (indicating).

Q Okay. So this gesture is his hands are sort of straight out in front about —

A Like this (indicating).

Q About, what is that, two and a half, three feet apart. So were his palms up?

A Yes.

(Muhammad Dep., Dkt. 73, Ex. 6 at 11-12.)

When responding to a motion for summary judgment, the non-moving party cannot rest merely on the pleadings alone, *Anderson,* 477 U.S. at 248, but has an obligation to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Celotex,* 477 U.S. at 324. In this case, Plaintiff has not presented any affirmative evidence in response to Defendant's motion other than cites to his own deposition testimony where he reiterates his allegation that Defendant instigated the confrontation by making an aggressive gesture similar to a "wrestling position." (Pl.'s Resp., Dkt. 75 at 5.) Instead, Plaintiff merely discounts the testimony of officers Metevia and McIntire, pointing out that they are co-workers of Defendant Close and employees of the MDOC, the entity that would have to pay any judgment if Plaintiff prevails. Plaintiff argues that "[a] jury may well discount such testimony as self-serving and biased." *(Id.)*

When analyzing this issue in the first R&R at the pre-discovery stage, the Court of course acted on the presumption that Plaintiff would uncover evidence during discovery, such as eyewitness testimony, that would support his allegations. Now, however, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker,* 879 F.2d at 1310. On this issue of whether Defendant Close instigated the incident by making a

"fighting stance," I suggest that the evidence proffered is, under this standard, entirely one-sided — favoring the Defendant.

Defendant Close similarly claims that he is entitled to summary judgment on the issue of whether he "overcharged" Plaintiff with the misconduct violation of Threatening Behavior. Defendant points to the deposition testimony of three witnesses in support of his argument that Threatening Behavior was an appropriate charge in light of Plaintiff's conduct. First, Sergeant Walter Tipton, who also witnessed the incident, was asked whether he perceived Plaintiffs conduct as threatening, and he responded: "Looked like he might was going to hit him or something was going to happen, that was obvious. If it was me personally, yeah, I may have felt threatened, if it was me personally." (Tipton Dep., Dkt. 73, Ex. 4 at 37.)

Second, Officer Metevia testified that he thought Defendant Close acted properly in writing the ticket. (Metevia Dep., Dkt. 73, Ex. 3 at 22.) Third, Hearing Officer Arvid Perrin, who found Plaintiff not guilty of Threatening Behavior but guilty of the lesser included offense of Insolence, testified that the Threatening Behavior charge was nevertheless not unjustified. He explained that, in his opinion, the fact that Plaintiff had not made an overt move to strike Defendant Close led him to the conclusion that the standard for Threatening Behavior had not been met, however, another hearing officer could have reached a different result:

> Q Now, just based on the facts of this [case], is this something where a different Hearing Officer could have reached a different decision [than] you?

> A More than likely, it could have been, yes. I'm sure that some Hearing Officers would have felt that this was threatening behavior. .

(Perrin Dep., Dkt. 73 at Ex. *5.)*

Defendant therefore asserts, supported by the testimony presented, that he "had good reason, based on the intensity of the confrontation, for writing the Threatening Behavior ticket." (Def.'s Mot., Dkt. 73 at 9.)

In response to this issue, Plaintiff again has presented no directly relevant affirmative evidence, but once more points out that the witnesses relied upon by Defendant are MDOC employees who have an interest in the matter. Plaintiff does provide the Court with a statistical report prepared by the MDOC showing major misconduct hearing statistics for all MDOC hearing officers, including the percentage of misconduct hearings where the charges were upheld, reduced, or dismissed. Plaintiff argues that Hearing Officer Perrin's testimony that another hearing officer may have found Plaintiff guilty of Threatening Behavior could be found by a jury to be "incredible" in light of the fact that the MDOC keeps such statistics and evaluates the performance of its hearing officers based upon the number of charges they uphold. (Pl. 's Resp., Dkt. 75 at 8-9.)

Once again I suggest that Plaintiff has failed to meet his burden of responding to the summary judgment motion with affirmative evidence of a sufficient disagreement to require submission to a jury. Obviously, Plaintiff does not have the burden of persuading this Court at the summary judgment stage to the same degree it would have to persuade a jury at trial. However, Plaintiff has failed to present any evidence other than Plaintiff's own allegations. His argument regarding the MDOC's performance evaluation methods may be engaging and

potentially admissible rebuttal at trial to testimony of Hearing Officer Perrin, but it is not evidence that Defendant Close's decision to charge Plaintiff with Threatening Behavior was an unreasonable overcharge in light of the facts.

d. Third Element - Causal Connection

The third element of a retaliation claim involves a defendant's subjective intent. See *Thaddeus-X*, 175 F.3d at 399. Plaintiff has the initial burden of showing that his protected conduct, which in this case was filing two previous lawsuits naming Close as a defendant, was a substantial or motivating factor behind the adverse action. See *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568. 50 L. Ed. 2d 471 (1977). Although a court may not require that a plaintiff prove motive by clear and convincing evidence at the summary judgment stage, *see Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 1595, 140 L. Ed. 2d 759 (1998), a plaintiff nonetheless must provide more than conclusory allegations of retaliatory motive to survive summary judgment. See *Smith v. Campbell*, 250 F.3d 1032, 1038 (6th Cir. 2000).

Plaintiff here states that "it is undisputed that Plaintiff was pursuing litigation against Defendant at the time of the incident in question. The jury is then left with the subjective credibility question of whether Defendant acted as he did because of those suits." (Pl.'s Resp., Dkt. 75 at 9.) Plaintiff has not, however, alleged that Defendant Close ever made any statements that he harbored bad feelings toward Plaintiff because of these prior lawsuits or that he intended to punish Plaintiff for filing them. Rather, Plaintiff's argument is solely that the temporal proximity

between the prior lawsuits and the dining room incident demonstrates a causal connection.

Defendant Close conversely claims that the timing of the prior lawsuits supports his position that he in no way was motivated to charge Plaintiff with misconduct because he wanted to retaliate for the prior suits. Defendant has provided copies of court dockets to show that the first lawsuit naming him as a defendant was filed by Plaintiff in December 1994, and summary judgment was granted to defendants in August 1995. The second suit was filed in February 1996 and was dismissed in December 1996. (Def. 's Mot., Dkt. 73 at 12, Exs. 8 & 9.) The alleged incident of retaliation which gave rise to this lawsuit occurred in May of 1997, two and a half years after the first suit was filed and one and a half years after the second. Defendant asserts that the intervals between the prior suits and this incident preclude any inference that the prior suits were a motivating factor behind his charging Plaintiff with misconduct. Furthermore, Defendant states that "[a]lthough Muhammad appealed these decisions [in the prior suits], there is nothing in the record showing that Officer Close was aware of Muhammad's appeals." *(Id.* at 12.) Defendant therefore asserts that Plaintiff has failed to establish a causal connection.

In his response to Defendant's summary judgment motion on this issue, Plaintiff has not presented any affirmative evidence other than the Plaintiff's own deposition testimony where he stated that there has been a "constant problem between me and him from 1994, from the time he chose to involve hisself [sic] with my litigation with other officers." (Pl.'s Dep., Dkt. 75 at Ex. 1.)

In *Smith v. Campbell*, 250 F.3d 1032 (6th Cir. 2001), the plaintiff claimed that he was transferred in retaliation for the grievances he filed against prison officials. With regard to the third element of the *Thaddeus-X* standard, the only valid connection plaintiff put forth concerning retaliatory motive was the fact that he was transferred only days after he informed his counselor that he was gathering documentation to file a grievance and a lawsuit.[4] *Id.* at 1038. The Sixth Circuit affirmed the district court's grant of summary judgment for defendants, stating:

> Aside from [the counselor's] statements, the temporal proximity between Smith filing his grievances and the decision to transfer him provides some circumstantial support for a causal connection. However, the Court concludes that this evidence alone is not sufficient to meet Smith's burden to show that the filing of grievances was a substantial or motivating factor for his transfer.

Id.

I suggest that in this case, as in *Smith*, the temporal proximity connection alone is insufficient to survive a motion for summary judgment. First, in this case the time frame between the protected conduct and the alleged retaliatory act is not a matter of days, but of years. It is entirely plausible that Defendant Close had no idea that Plaintiff had filed appeals of the prior lawsuits, and Plaintiff has not refuted that claim. *See Matsushita*, 475 U.S. at 587-88 (stating that in determining whether the moving party has met its considerable burden, a court may consider the plausibility of the moving party's evidence). Moreover, like in *Smith*, the temporal

[4] The Plaintiff also claimed that his counselor's alleged statement that the prison could transfer him at any time and say it was based on institutional needs supported the inference of retaliatory motive, but the Sixth Circuit rejected that notion because the counselor was not the decisionmaker with regard to the transfer. *Id.* at 1038.

proximity claim is the sole support for Plaintiffs claim that Defendant Close acted with retaliatory animus, as apparently no statements from Defendant or others were adduced in discovery which could serve as evidence to put before a jury to satisfy this element.

e. Conclusion

I therefore suggest that, faced now with the Defendant's well-supported motion for summary judgment, Plaintiff has failed to come forward with evidence on which a jury could reasonably find that Defendant Close retaliated against Plaintiff because of his prior lawsuits. Although Plaintiff has met one element of a retaliation claim, and his *pro bono* counsel has vigorously advocated Plaintiff's position, the evidence on the other two elements is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 251-52. Accordingly, I suggest that Defendant's motion for summary judgment be granted.

Because I have suggested that Plaintiff has failed to present sufficient evidence to survive summary judgment, the alternate grounds for summary judgment presented in Defendant's motion shall not be addressed.

III. REVIEW

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal.

See Thomas v. Am, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Howard* V. *Sec'y of Health & Human Servs.*, 932 F.2d 505 (6"' Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6"' Cir. 1981). The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. See *Willis v. Sec 'y of Health & Human Servs.*, 931 F.2d 390, 401 (6"' Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6"' Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

CHARLES E. BINDER
United States Magistrate Judge

DATED: August 15, 2001

Copies to: Ms. Wendy Davis Kanar, Attorney at Law, 414 Townsend St., P.O. Box 632, Midland, MI 48640
Mr. Kevin Himebaugh, Assistant Attorney General, Corrections Division, P. 0. Box 30217. Lansing, MI 48909
Honorable David M. Lawson, United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SHAKUR MUHAMMAD,
aka John B. Mease,

Plaintiff,

v.

MARK CLOSE,

Defendant.

No. 98-CV-10153-BC
Hon. David M. Lawson

OPINION AND ORDER ADOPTING REPORT AND RECOMMENDATION AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff filed this prisoner civil rights complaint against the defendant, a corrections officer, alleging unlawful retaliation contrary to 42 U.S.C. § 1983. After two previous dispositive motions were denied, the defendant filed his third motion for summary judgment, alleging that the plaintiff offered insufficient evidence to proceed to trial on his First Amendment retaliation claim. After reviewing the initial motion papers, the plaintiffs response, and the defendant's reply brief, the Magistrate Judge, operating under a full-case reference pursuant to 28 U.S.C. § 636(b)(1), recommended that the defendant's motion be granted. After the plaintiffs pro bono counsel declined to file objections on his behalf, the plaintiff requested the right to file his own objections, and the Court granted that request on November 8, 2001. The plaintiff filed his objections on November 29, 2001. After *de novo* review of the Magistrate Judge's Report and Recommendation, and the papers filed in this case, the Court agrees that the defendant's motion should be granted.

I.

This case arose from an incident on May 21, 1997 while the plaintiff was incarcerated at the Standish Maximum Correctional Facility ("SMF"). The plaintiff alleges that the defendant, a corrections officer at SMF, intentionally provoked the plaintiff and wrote a violation accusing

the plaintiff of Threatening Behavior, a serious offense. Specifically, the plaintiff claims that he noticed the defendant staring at him through a dining room window, and that the plaintiff stared back. In response, the defendant allegedly stormed into the dining room, and the plaintiff then rose from his seat and approached the defendant. The plaintiff was then handcuffed and led away to a detention cell.

The defendant subsequently initiated disciplinary proceedings against the plaintiff, charging him with Threatening Behavior, defined as threatening words or behavior expressing an intent to injure another. See MDOC P.D. 03.03.105, P1's S.J. Ex. 2 at 2. Six days after the incident, a disciplinary hearing was held and the plaintiff was found not guilty of Threatening Behavior, but found guilty of the lesser charge of Insolence, defined as words, actions or other behavior intended to harass or cause alarm to an employee. See *id* at 3. The plaintiff was punished with seven days detention and thirty days' loss of privileges.

The plaintiff alleges that the provocation and write-up was in retaliation for two prior lawsuits filed by the plaintiff against the defendant. The plaintiff first filed suit against defendant Close in 1994; Close was granted summary judgment in 1995. The second suit was filed in February, 1996 and dismissed in December, 1996.

The defendant now contends that he is entitled to summary judgment because the plaintiff has failed to come forward with sufficient evidence to support his allegations that he was subjected to adverse action and that the action taken against him, even if adverse, was in retaliation for the prior suits.

II.

In the Sixth Circuit, a prisoner alleging retaliation for engaging in an activity protected by the First Amendment must establish three elements: the plaintiffs engagement in protected

conduct, adverse action taken against the plaintiff that would deter a person of ordinary firmness from engaging in protected conduct, and proof that the adverse action was motivated at least in part by the plaintiffs engagement in the protected activity. *See Thaddeus-Xv. B/alter,* 175 F.3d 378, 386 (6th Cir. 1999) (en banc). The first element is not disputed here: even though incarcerated, the plaintiff retains the right of access to the courts. See *Bounds v. Smith,* 430 U.S. 817, 821-24 (1977). The defendant instead challenges the plaintiffs showing on the second and third elements of his retaliation claim. The Magistrate Judge found that the defendant's showing on the second element was so one-sided that summary judgment was appropriate. However, the defendant's arguments against the third element are much stronger, and dispositive of this case.

When the plaintiff has the burden of proof on a claim, the defendant may support a motion for summary judgment when he demonstrates that the plaintiff lacks sufficient evidence on any element of that claim. *Street v. IC. Bradford & Co.,* 886 F.2d 1472, 1478 (6th Cir. 1989). Once the defendant has made such a showing, the plaintiff may not rely solely on his pleadings, but must offer affirmative evidence from which a reasonable fact finder could find in his favor. *See Matsushita Flee. Indus. Co., Ltd v. Zenith Radio Corp., 475* U.S. 574, 586-87 (1986). The plaintiff's showing must be more than an assertion that the trier of fact could disbelieve the defendant's proffered evidence. *Street,* 886 F.2d at 1479. Even when the plaintiff does offer affirmative evidence, however, the Court must view all reasonable inferences arising from that evidence in the light most favorable to the plaintiff. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986). As a result, although the plausibility of circumstantial evidence may be considered, any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. *Adams v. Metiva,* 31 F.3d 375, 382 (6th Cir. 1994). However, when the evidence is so one-sided that no reasonable jury could find for the non-moving party

for the non-moving party, summary judgment as a matter of law should be granted. *Anderson*, 477 U.S. at 251-52.

On the third element of the plaintiffs retaliation claim, causation, the defendant has demonstrated a lack of affirmative evidence for the plaintiff's claim. Specifically, the defendant points out that the incident at issue in this case occurred two and a half years after the first suit was filed and one and a half years (actually about fifteen months) after the second. The defendant correctly notes that the temporal connection between these lawsuits and the incident in question is remote. In response to the defendant's motion, the plaintiff pointed to his prior litigation with the defendant, and further stated that there has been a "constant problem between me and him from 1994, from the time he chose to involve hisself [sic] with my litigation with other officers." Pl's Dep., dkt. 75, Ex. 1. In this Circuit, however, temporal proximity by itself is generally insufficient to establish causation for a retaliation claim. *See Smith v. Campbell*, 250 F.3d 1032, 1038 (6th Cir. 2000); *Nguyen* v. *City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000). In the absence of additional probative evidence, the Sixth Circuit has specifically found that a delay of even five months is too long. *See, e.g., Hafford* V. *Seidner*, 183 F.3d 506, 518 (6th Cir. 1999) (two to five month delay is too long); *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986) (four months too long). The time gap in this case is fifteen months, which is clearly outside the parameters established by the Sixth Circuit. Furthermore, the plaintiff's generalized assertion of animosity between himself and the defendant is plainly insufficient. Under the plaintiff's reasoning, he would be able to proceed with a retaliation claim anytime this defendant took adverse action against him. This result would create unreasonable disorder in the prison context, where officer-inmate animosity and civil rights lawsuits have evolved into a ritualistic form of social intercourse.

Thus, the Magistrate Judge's finding that the plaintiff had not sustained his burden of proof on this element was correct. In his objections to this finding, the plaintiff contends that temporal proximity is sufficient to establish this element, the clearly established precedential law of this Circuit to the contrary notwithstanding. He also claims that the case for causation is 'strengthened by' his absence from SMF for much of the time between the filing of his second lawsuit and the incident in question, and his assertion that the incident was the first time in several months that the defendant and the plaintiff had any personal contact. Pl's Obj. at 13-14. The plaintiff also attached his log of the events he deems significant occurring between 1996 and the incident in this case. *Id.* Ex. H, at 1-4. Even if these notes were admissible, there is still no direct evidence of animosity, such as statements made by the defendant, that the Court would be required to take as true. *See Adams*, 13 F.3d at 382. Further, the conclusion is inescapable that no reasonable fact finder would draw an inference of causation from these items. The plaintiff essentially asks this Court to trust his hunch that the defendant's adverse action against him was motivated by his past lawsuits. Given the clear precedent in this Circuit, however, that speculation and hunches are insufficient to defeat a summary judgment motion, the Court declines the plaintiff's invitation. *See Hartsel v. Keys*, 87 F.3d 795, 802 (6th Cir. 1996).

III.

Although, as noted in the rulings on the defendant's first two motions for summary judgment, the plaintiff's complaint properly pleads all the elements of a retaliation claim, the plaintiff has not been able to deliver factual support. The law is clear that the plaintiff may not rely on his pleadings alone. The plaintiff's prior history of litigation with the defendant is the only circumstantial support for his theory of retaliation. However, this Court is bound by Circuit

precedent that rejects the sufficiency of such evidence standing alone. The Magistrate Judge's Report and Recommendation is thus correct, and the defendant's motion for summary judgment will be granted.

Accordingly, it is **ORDERED** that the Magistrate Judge's Report and Recommendation is **ADOPTED.**

It is **FURTHER ORDERED** that the defendant's Motion for Summary Judgment [dkt #73] is **GRANTED.**

David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 17, 2001

Copies to:
Shakur Muhammad — #213302, 1576 Bluewater Highway, Ionia, MI 48846
Wendy Davis Kanar, Esq.
Kevin Himebaugh, Esq.
Honorable Charles E. Binder, United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SHAKUR MUHAMMAD,
aka John B. Mease,

Plaintiff,

v.

MARK CLOSE,

Defendant.

No. 98-CV-10153-BC
Hon. David M. Lawson

JUDGMENT

In accordance with the Opinion and Order entered on this date,

It is **ORDERED AND ADJUDGED** that the judgment is entered for the defendant and against the plaintiff.

It is further **ORDERED AND ADJUDGED** that the plaintiff takes nothing on its complaint, and the case be dismissed with prejudice.

David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 17, 2001

Copies sent to:
Shakur Muhammad - #213302, 1576 Bluewater Highway, Ionia, MI 48846
Wendy Davis Kanar, Esq.
Kevin Himebaugh, Esq.
Magistrate Judge Charles E. Binder

No. 02-1043

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHAKUR MUHAMMAD, also known as John E. Mease,

Plaintiff-Appellant,

v.

MARK CLOSE, Correctional Officer,

Defendant-Appellee

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 28(g) limits citation to specific situation
Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Before: MARTIN, Chief Judge; MOORE, Circuit Judge; WISEMAN, District Judge.*

Shakur Muhammad appeals a district court grant of summary judgment for defendant in this civil rights action filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Muhammad filed his complaint in the district court alleging that the defendant corrections officer falsely charged him with major misconduct threatening behavior in retaliation for prior lawsuits and grievances plaintiff filed against defendant. Plaintiff named defendant in his individual and official capacities and sought compensatory and punitive damages and expungement of the resulting misconduct conviction on a reduced charge of insolence. Defendant moved to dismiss the complaint or for summary judgment, and plaintiff responded in opposition and moved for leave to amend his complaint. The magistrate judge recommended that defendant's motion to dismiss or for summary judgment be denied and that plaintiffs motion to amend his complaint be granted, and

* The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

defendant filed objections. The district court adopted the magistrate judge's recommendation and denied defendant's motion, and plaintiff filed an amended complaint.

Thereafter, the magistrate judge appointed counsel to represent plaintiff, and defendant moved to dismiss the complaint for failure to exhaust administrative remedies. The magistrate judge recommended that the motion to dismiss be denied, and defendant filed objections. The district court adopted the magistrate judge's recommendation and denied defendant's motion to dismiss.

Following discovery, defendant again moved the district court for summary judgment, plaintiff responded in opposition, and defendant submitted a reply. The magistrate judge recommended that summary judgment for defendant be granted, and the district court granted plaintiff leave to file pro se objections after counsel declined to do so. The district court adopted the magistrate judge's recommendation and granted summary judgment for defendant. Plaintiff filed a timely notice of appeal pro se. On appeal, plaintiff contends that he established a genuine issue of material fact remaining for trial with respect to whether defendant retaliated against him in violation of the First Amendment. Defendant responds that the district court's judgment was proper.

Upon Denied. novo review, *see Brooks v. Am. Broad. Cos.*, 932 F.2d 495, 500 (6th Cir. 1991), we affirm the judgment of the district court. The plaintiff seeks punitive and compensatory damages and requests that "the misconduct charge [be] expunged from his file." J.A. at 14. Thus this case falls directly within the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), which this circuit applied to a prisoner seeking damages and expungement of a disciplinary infraction in *Huey v. Stine*, 230 F.3d 226, 228 (6th Cir. 2000). "In order to grant the plaintiff in this case the relief he seeks, we would have to unwind the judgment of the state agency." *Id.* at 230. Thus *Heck* bars the plaintiff's action under 42 U.S.C. § 1983.

Accordingly, the district court's judgment is affirmed. *See* Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Clerk

No. 02-1043

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHAKUR MUHAMMAD, also known as John E. Mease,	)	
Plaintiff-Appellant,	)	
v.	)	ORDER
MARK CLOSE, Correctional Officer,	)	
Defendant-Appellee	)	

Before: MARTIN, Chief Judge; MOORE, Circuit Judge; WISEMAN, District Judge.*

Shakur Muhammad petitions the court to rehear its September 23, 2002, order that affirmed a district court grant of summary judgment for defendant in this civil rights action filed under 42 U.S.C. § 1983.

Upon consideration, the panel concludes that it acted under no misapprehension of law or fact in issuing its order. See Fed. R. App. P. 40(a).

Accordingly, the petition for a rehearing is denied.

ENTERED BY ORDER OF THE COURT

Clerk

* The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

No. 02-9065

In the Supreme Court of the United States

Shakur Muhammad, aka John E. Mease,

Petitioner,

v

Mark Close,

Respondent.

CERTIFICATE OF SERVICE

Cynthia A. Aven, being first duly sworn, deposes and says that on May 12, 2003, she served three copies of the brief in opposition upon the following by enclosing same in a properly addressed envelope and depositing same in the United States mail in Lansing, Michigan:

Shakur Muhammad
#213302
1576 Bluewater Hwy
Ionia, MI 48846

All parties required to be served have been served.

Cynthia A. Aven

Subscribed and sworn to before me this
12th day of May, 2003.

Natalie D. Thelen, Notary Public
State of Michigan
County of Clinton, Acting in Ingham County
My commission expires: 12/08/05

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No. 02-9065 (3)

IN THE SUPREME COURT OF THE UNITED STATES

SHAKUR MUHAMMAD,
PETITIONER,

V.

MARK CLOSE,
RESPONDENT.

RECE
MAY 28 2003

ON PETITION FOR WRIT OF CERTIORARI
to the United States Courts Of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF
to RESPONDENTS BRIEF IN OPPOSITION

SHAKUR MUHAMMAD
IN PRO SE
ICF # 213302
1576 BLUEWATER HWY.
IONIA, MICHIGAN
48846

6 pp

REASONS TO GRANT PETITION FOR CERTIORARI

Now comes PETITIONER in the above-entitled and submits his Reply Brief pursuant to this Court's Rule 15 (5).

PETITIONER RELIES ON the facts as stated in his Statement of the Case portion of his Writ of Certiorari to dispute MISREPRESENTATIONS set forth in RESPONDENTS Statement of the Case, and REPLIES as follows to RESPONDENTS contentions.

I. THE COURT OF APPEALS DID NOT RELY UPON THE RELIEF SOUGHT IN PETITIONER'S AMENDED COMPLAINT AND DID NOT PROPERLY APPLY THE HECK DOCTRINE IN THIS CASE

RESPONDENTS CONCEDE in their Brief that the Court of Appeals ERRED in REFERRING to the RELIEF sought in PETITIONER'S original complaint instead of the RELIEF sought in his amended complaint, and that there is a disagreement ~~exist~~ in the circuits after this Court's holding in SPENCER V. KEMNA, 523 US 1 (1998) IN REGARDS to the application of the HECK [V. HUMPHREY, 512 US 477 (1994), AS APPLIED TO PRISONER CASES IN EDWARDS V. BALISOK, 520 US 641 (1997)] doctrine.

PETITIONER BRIEFLY ADDRESSES RESPONDENTS MISREPRESENTATION of the RECORD and the UNTIMELY ASSERTIONS of "alternative grounds" for PURPOSES of SUMMARY DISPOSITION at this STAGE in the PROCEEDINGS. HOWEVER, PETITIONER MAINTAINS that RESPONDENTS obvious ACKNOWLEDGMENT of the MERITS of QUESTIONS PRESENTED in his WRIT for CERTIORARI is ENOUGH for this Court to conclude that its GUIDANCE is WARRANTED in this MATTER.

PUBLISHER'S NOTE:

Page(s) 2 missing in original.

The Court of Appeals failed to make any Ruling Regarding the district courts grant of summary judgment to Respondents on the basis of the third prong of the Sixth Circuits First Amendment Retaliation analysis not being met in accordance with Thaddeus-X v. Blatter, 175 F.3d 378, 394, (CA 6 1999).

The third prong of Thaddeus-X's analysis requires "a causal connection between elements one and two - that is, the adverse action was motivated at least in part by the plaintiffs protected conduct. Id. at 394.

The causation requirement, specifically the "temporal proximity" element was addressed earlier in this case in the district courts Mar. 26th, 1999 decision Regarding the lapse of time between prior lawsuits/grievances and the current incident giving rise to this cas SEE Respondents Appendix at pp. 43a-44a of the Dist. Courts Order Adopting Mag.'s R and R. (Note that page 9 of the Order was omitted by Respondents.) The district court found that "the "lengthy period of time" discussion in Benson v. Cady, 761 F.2d 335, 342 (7th Cir. 1985) ... does not prevent the finding that a genuine issue of material fact exists in the instant case sufficient to prevent summary judgment." SEE Respondents Appendix at p. 44a.

Because of the contradictions in the district court's Rulings, Petitioner asserts that the "temporal proximity" element of Thaddeus-X must be scrutinized thoroughly and ~~as~~ argued this on Appeal. However, the court of appeals failed to address this issue in its Order of Sept. 23rd, 2002. SEE Respondents Appendix at pp. 72a-73a.

As stated above, Respondents have conceded that the Heck issue is in conflict in the circuits after Spencer requiring clarification by this Court. However, Respondents contend that this isn't the

case warranting the Resolution of these issues because Petitioner's presented question Regarding the district court's grant of summary judgment would burdensome and time consuming for this Court.

Petitioner Maintains that Respondents contentions are self serving and without merit in light of the foregoing issues Regarding the "temporal proximity" element of his First Amendment Retaliation claim Also because of the conflict on this issue in the district courts and the first that Relied has not been had in the appeals court.

Respondents further claimed that the district court decided this case without giving consideration to the Heck issue. However, the district court adopted the R and R of the Magistrate which extensively addressed the Heck issue in light of Spencer. SEE Respondents Appendix at pp. 36a-37a, dist. Courts Order and pp. 23a-29a of Mag.'s R and R, Respectively.

Petitioner Maintains that the issues of this case are deserving of this Courts scrutiny.

Conclusion

The Petition for a Writ of Certiorari should be GRANTED.

May 19th, 2003

Respectfully,
Shakur Muhammad
ICF # 213302
1576 Bluewater Hwy.
Ionia, Michigan
48846

William K. Suter
Clerk of the Court
Supreme Court of United States
1 First Street, NE.
Washington, D.C.
20543

May 19th, 2003

Dear Clerk,

Re: Muhammad v. Close,
U.S. Supreme Court No. 02-9065

Please find enclosed for filing the Reply Brief of Petitioner with proof of service thereof. Thank you.

Kind Regards,
Shakur Muhammad
IN PRO SE
ICF # 213302
1576 Bluewater Hwy.
Ionia, Michigan
48846

MAY 28 2003

Enclosed
cc: Thomas L. Casey

No. 02-9065

IN THE SUPREME COURT OF THE UNITED STATES

SHAKUR MUHAMMAD,
Petitioner,
v.
Mark Close,
Respondent.

MAY 28 2003

Proof Of Service

The undersigned certifies that a copy of Petitioner's Reply Brief has been served upon counsel for Respondent at his business address by U.S. Mail, postage paid at Ionia Michigan on May 19th, 2003. Counsel for Respondent is:

Thomas L. Casey
Solicitor General
P.O. Box 30212
Lansing, Mi. 48909.

Undersigned declares under penalty of perjury that the foregoing is true and accurate.

Respectfully,
Shakur Muhammad
ICF # 213302
1576 Bluewater Hwy.
Ionia, Michigan
48846

Enclosure
cc: Thomas L. Casey

(4)

No. 02-9065

Supreme Court, U.S.
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In The
Supreme Court of the United States

SHAKUR MUHAMMAD, aka John E. Mease,

Petitioner,

v.

MARK CLOSE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed February 11, 2003
Certiorari Granted June 16, 2003

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari at the following pages:

Magistrate Judge's Report and Recommendation, *Muhammad v. Close*, Case No. 98-CV-10153, U.S. District Court for the Eastern District of Michigan (November 23, 1998) 1a-35a

Order Adopting Report and Recommendation, *Muhammad v. Close*, Case No. 98-CV-10153, U.S. District Court for the Eastern District of Michigan (March 26, 1999) 36a-46a

Magistrate Judge's Report and Recommendation, *Muhammad v. Close*, Case No. 98-CV-10153, U.S. District Court for the Eastern District of Michigan (August 15, 2001) 47a-64a

Order Adopting Report and Recommendation, *Muhammad v. Close*, Case No. 98-CV-10153, U.S. District Court for the Eastern District of Michigan (December 17, 2001)..... 65a-70a

Judgment, *Muhammad v. Close*, Case No. 98-CV-10153, U.S. District Court for the Eastern District of Michigan (December 17, 2001) 71a

Order Denying Rehearing, *Muhammad v. Close*, Case No. 02-1043, U.S. Court of Appeals for the Sixth Circuit (November 14, 2002).....74a

United States District Court
Eastern District of Michigan (Bay City)
Case No. 98-CV-10153

Muhammad v. Close

June 2, 1998	Complaint
June 23, 1998	Order by Judge Robert H. Cleland referring case to Magistrate Judge Charles E. Binder for a report and recommendation
July 28, 1998	Motion by plaintiff Shakur Muhammad for appointment of attorney
July 31, 1998	Motion by defendant Mark Close to dismiss, and for summary judgment
August 12, 1998	Order by Magistrate Judge Binder denying motion for appointment of attorney by Shakur Muhammad
September 16, 1998	Motion by plaintiff Shakur Muhammad to amend complaint, and response by plaintiff Shakur Muhammad to defendant Mark Close's motion to dismiss
November 24, 1998	Report and Recommendation by Magistrate Judge Charles E. Binder that motion to amend complaint by Shakur Muhammad be granted, and motion to dismiss and motion for summary judgment by Mark Close be denied
March 26, 1999	Order by Judge Robert H. Cleland accepting Report and Recommendation, granting Shakur Muhammad's motion to amend complaint and denying Mark Close's motion to

	dismiss and motion for summary judgment
April 2, 1999	Motion by plaintiff Shakur Muhammad for reconsideration of motion for appointment of attorney
April 7, 1999	Amended Complaint
October 19, 1999	Order by Magistrate Judge Charles E. Binder granting motion for reconsideration of motion for appointment of attorney, and order appointing attorney Wendy Kanar as pro bono representation of plaintiff
May 31, 2000	Notice by plaintiff Shakur Muhammad of taking of deposition of Steven D. Bellows, Joseph Chudznski, Mark Close, Kelly J. Goheen, Richard A. Metevia, Arvid Perrin, and Walter J. Tipton, Jr., on June 7, 2000
June 28, 2000	Amended notice by defendant Mark Close of taking deposition of plaintiff Shakur Muhammad on July 11, 2000
July 3, 2000	Notice by defendant Mark Close of taking deposition of Lorenzo Jones and Devond D. Screw on July 12, 2000
July 14, 2000	Notice by defendant Mark Close of taking deposition of Zebadiah Mendel Holland on July 11, 2000
August 3, 2000	Motion by defendant Mark Close to dismiss complaint

August 28, 2000	Response by plaintiff Shakur Muhammad to motion to dismiss complaint
September 5, 2000	Reply by defendant Mark Close to response to motion to dismiss complaint
November 2, 2000	Report and recommendation by Magistrate Judge Binder that motion to dismiss complaint be denied
November 9, 2000	Objections to Report and Recommendation by defendant Mark Close
November 14, 2000	Response by plaintiff Shakur Muhammad to defendant's objections
January 12, 2001	Order by Judge David M. Lawson adopting Report and Recommendation and denying defendant's motion to dismiss complaint
February 6, 2001	Motion by defendant Mark Close for summary judgment
March 12, 2001	Response by plaintiff Shakur Muhammad to defendant's motion for summary judgment
March 15, 2001	Reply by defendant Mark Close to plaintiff's response to defendant's motion for summary judgment
August 18, 2001	Report and Recommendation by Magistrate Judge Binder that defendant's motion for summary judgment be granted
August 29, 2001	Motion by plaintiff Shakur Muhammad to extend time to file objections

	to Magistrate's Report and Recommendation
November 5, 2001	Request by plaintiff Shakur Muhammad to extend time to file objections to Report and Recommendation
November 9, 2001	Order by Judge David M. Lawson granting plaintiff Shakur Muhammad's motion to extend time to file objections to Magistrate's Report and Recommendation
November 13, 2001	Motion to withdraw by Wendy Davis Kanar as attorney for Shakur Muhammad
November 20, 2001	Order by Judge David M. Lawson denying Wendy Davis Kanar's motion to withdraw as attorney for Shakur Muhammad
November 29, 2001	Objections by Shakur Muhammad to Report and Recommendation
December 7, 2001	Response by defendant Mark Close to plaintiff's objections
December 17, 2001	Memorandum opinion and order by Judge David M. Lawson accepting Report and Recommendation and granting defendant's motion for summary judgment
December 17, 2001	Judgment for defendant entered by Judge David M. Lawson
January 2, 2002	Plaintiff Shakur Muhammad's notice of appeal to U.S. Court of Appeals

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United States Court of Appeals for the Sixth Circuit
Docket No. 02-1043

Muhammad v. Close

January 8, 2002	Prisoner Case Docketed
January 31, 2002	Brief filed by Shakur Muhammad for Appellant Shakur Muhammad
March 7, 2002	Brief filed by Kevin R. Himebaugh for Appellee Mark Close
March 7, 2002	Request to waive oral argument and submit case on the briefs filed by Kevin R. Himebaugh for Appellee Mark Close
March 22, 2002	Pro Se Reply Brief filed by Shakur Muhammad for Appellant Shakur Muhammad
September 23, 2002	Order filed: Affirmed in unpublished decision
September 30, 2002	Petition for rehearing before original panel filed by Appellant Shakur Muhammad
November 14, 2002	Order filed denying petition for rehearing before original panel
November 22, 2002	Mandate issued with costs of $566.25 to be recovered by Appellee

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

NORTHERN DIVISION

SHAKUR MUHAMMAD, (#213302), a/k/a JOHN MEASE,

Plaintiff,

vs.

MARK CLOSE,

Defendant.

FILE NO. 98 cv 10153 BC
HON. VICTORIA A. ROBERTS
MAG. CHARLES BINDER

The following Policy Directive was attached to a pleading filed in the above court.

MICHIGAN DEPARTMENT OF CORRECTIONS **POLICY DIRECTIVE**	EFFECTIVE DATE 6-6-94	NUMBER 03.03.105
	SUPERSEDES PD-DWA-60.01 (3-12-90) DOM 1994-27	
	AUTHORITY MCLA 24.207(k); 791.203; 791.206; 791.251 *et seq.*; and 800.33 Administrative Rules 791.3301-.3320; 791.5501-.5513	
SUBJECT PRISONER DISCIPLINE		
	ACA STANDARDS 3-4214 through 3-4236	

I. POLICY STATEMENT — Disciplinary sanctions shall be imposed against prisoners for rule violations in accordance with due process requirements.

II. POLICY: GENERAL INFORMATION

A. Alleged violations of written rules are classified as "major misconduct" or "minor misconduct" and are further defined on attachments A, B and C of this policy. Misconduct reports may be written only for the violations which are on these attachments.

B. The structure of the disciplinary process is one of progressive sanctions. The least drastic method to ensure compliance with the rules should be used. Counseling and

summary action should be attempted to correct minor violations. However, when rule infractions require more formal resolution, a misconduct report may be written. If a misconduct report is written, it should be prepared as soon as possible after the violation is observed or reported. Since the possible sanctions are more severe for major misconduct, greater procedural safeguards are provided for those charged with such violations.

SUMMARY PUNISHMENT

C. An employee who observes a minor misconduct violation may impose summary punishment, which does not exceed 1 day toplock, 8 hours extra duty, or 7 days loss of privileges, for minor misconduct if the prisoner signs a waiver of her/his right to a minor misconduct hearing. Any nondangerous contraband shall be confiscated in conjunction with a summary punishment and turned over to appropriate institutional staff for proper disposition. The prisoner shall be given a contraband removal slip by the staff member confiscating the contraband.

D. A record of this action shall be on file with the deputy warden, assistant deputy warden or other supervisory level person. If the prisoner does not sign an offered summary action, the resultant misconduct

report shall be processed and heard as a "minor" regardless of the charge or the prisoner's disciplinary record.

MINOR MISCONDUCT

E. A prisoner charged with minor misconduct shall have a right to the following:

1. Advance written notice of the charge unless s/he waives this in favor of an informal summary action.
2. A hearing conducted in compliance with the procedures set forth in R 791.3310 by an employee designated by the institutional or Field Operations Administration (FOA) operating procedure. The employee designated as the hearing officer shall have had no prior direct involvement in the matter at issue.
3. To be present at the hearing. If the prisoner refuses to attend, it shall be verified on the hearing report that the prisoner was notified of the hearing and refused to attend. In all cases, the prisoner shall receive a copy of the hearing officer's written decision.
4. An appeal of the hearing officer's decision to supervisory staff at the level of assistant

deputy warden, camp supervisor or community program supervisor. The appeal must be filed within 24 hours of receipt of the hearing officer's written decision.

F. The hearing officer in a minor misconduct case shall ensure that all relevant evidence has been presented and that the prisoner has had adequate time and opportunity to prepare his or her defense. A prisoner does not have the right to a hearing investigator for minor misconduct but the hearing officer shall make a reasonable investigation of charges and assist those prisoners who have limited intelligence or education in presenting a defense. The decision of the hearing officer shall be based on a preponderance of the evidence.

G. A waiver of a minor misconduct hearing may be accepted by either the hearing officer or reviewing officer. Property determined to be nondangerous contraband at a minor misconduct hearing shall be confiscated and turned over to appropriate staff for disposition. (See 04.07.112, "Prisoner Personal Property Control.") The disposition shall be noted on the hearing report.

H. Unless a minor charge is part of a major misconduct hearing, minor

misconduct hearing reports shall not be filed in the prisoner's files, except that a copy of the minor misconduct hearing report shall be kept in the Residential and Electronic Programs (REP) field file or the counselor's file for at least 60 days after the date of the hearing for control and monitoring purposes and to provide the basis for establishing a pattern of minor reports if other action becomes necessary. If a major misconduct charge is reduced to a minor by the major misconduct hearing officer, a copy of the entire hearing record shall be retained by the hearing investigator as set forth later in this policy. Also, a copy of the hearing report shall be retained in the field or counselor's file for at least 60 days.

MAJOR MISCONDUCT

I. A major misconduct report may be written by any department staff person or a person under contract with the department who has knowledge that a misconduct has occurred. A major misconduct report shall be written if the behavior constitutes a non-bondable major misconduct charge.

J. Major misconduct which is also a felony shall be referred to the appropriate law enforcement agency as well as being pursued

through the departmental disciplinary process. The initiation of the departmental disciplinary process may be delayed if it would interfere with the criminal investigation or prosecution. Prisoners charged with major misconduct are entitled to a formal hearing, following the procedures set forth in R 791.3315. The major misconduct hearing process is further described in the sections set out below.

Review

1. A reviewing officer shall conduct a preliminary review with the prisoner of every major misconduct report. A reviewing officer shall be a supervisory level employee in Correctional Facilities Administration (CFA) institutions and in FOA, an employee specifically designated by procedure. Major misconduct violations which occur in CFA institutions, shall be reviewed within 24 hours after the report is written, unless there is reasonable cause for delay, as determined by the hearing officer. Major misconduct violations which occur in FOA shall be reviewed as soon as possible, unless there is reasonable cause for delay, as determined by the hearing officer. If the report is not reviewed within that time period, and there is

no reasonable cause for delay, it shall be dismissed by the hearing officer.

2. The review is the beginning of formal processing and investigation of the misconduct report and shall include:

   a. examination of the report to determine that it is appropriate and correct;.

   b. reading of the report to the prisoner;

   c. advising the prisoner of his/her right to witnesses, relevant documents, and a hearing investigator;

   d. notation on the misconduct report of the location of any physical evidence and attachment of a photograph, if appropriate; and,

   e. ensuring that the prisoner receives a copy of the misconduct report.

3. If the reviewing officer determines that a report is not appropriate or not properly written, s/he may return the report to the staff member who wrote the misconduct report for a re-write. The reviewing officer also may pull a misconduct report which s/he determines to be inappropriate, but

shall first discuss it with the reporting staff person. Once a misconduct report has been reviewed, it shall not be pulled except by the warden for good cause.

4. Any report which is pulled shall be retained by the warden for six months and shall be accompanied by a written statement indicating why the report was pulled. A misconduct shall not be pulled after it has been heard by a hearing officer. The prisoner or the warden may request a rehearing by submitting a Request for Rehearing form (CSH-418) to the Hearings Administrator.

5. At the review, the reviewing officer shall order the prisoner to be confined in segregation or on toplock pending a formal hearing if the charge is nonbondable (as designated on Attachment B) or if there is a reasonable showing that failure to do so would constitute a threat to the security or good order of the facility.

6. The warden or FOA area manager may allow a prisoner charged with a non-bondable offense to remain on bond if it is determined that this will not present a threat to safety or

security. In addition, a reviewing officer may place a prisoner who is charged with escape on bond if the escape charge was incurred at an institution of a lower security level than the one where the prisoner is now incarcerated.

7. For example, a prisoner who escapes from REP or a camp, and is returned to a level III facility, may be placed on bond status pending his/her hearing if the reviewing officer determines that s/he is not a threat to security at the present custody level if placed on bond.

8. If a prisoner charged with a non-bondable misconduct is allowed to remain in general population, the reason shall be stated on the misconduct report.

9. The reason given for confining a prisoner for a bondable offense must relate to the specific circumstances of the incident. In other words, it must state why this case differs from other instances of this charge and thus presents a threat to security. Conclusory phrases such as "necessary for the good order of the facility" are *not* acceptable as reasons. The reason must state the facts underlying the charge which

make it necessary to lock up the accused prisoner for an offense which policy has already determined can normally be safely handled as a bondable matter.

10. Whenever a prisoner is placed in segregation or on toplock for a charge or charges which are by policy bondable, and an adequate reason is not given on the misconduct report for this action, the hearing officer shall report the matter to the warden or FOA area manager and to the Hearings Administrator. The warden or FOA area manager shall ensure that all employees comply with this policy on bondable charges.

11. If a prisoner is placed in segregation or on toplock, the exact time and date of placement shall be noted on the misconduct report by the reviewing officer who also shall immediately notify the prisoner's housing unit of this placement. The person notified in the housing unit shall be indicated on the misconduct report.

12. In FOA, where a prisoner may be confined to a local jail pending a hearing, the date and time of placement in the jail or of notification of such

placement to the Department shall be noted on the misconduct report.

Investigation

13. A hearing investigator shall gather all witness statements and other evidence necessary to conduct a hearing. The prisoner may submit written questions to the hearing investigator to be asked of a witness. The hearing investigator shall obtain answers to all questions which s/he reasonably believes are relevant, not repetitious, and not a threat to the security of the facility.

14. The hearing investigator may initially determine if a question should be asked or a witness contacted. However, the hearing officer has the final authority and may require the hearing investigator to obtain an answer to a question if s/he determines that an answer is needed. The hearing investigator also shall contact any other witness, and obtain any documents, which are relevant to the charge.

15. It is the responsibility of the hearing investigator to conduct a complete investigation of the charge(s) and not simply respond to the questions raised

by the prisoner. The hearing officer also may interview a witness at the hearing if s/he determines this is necessary and not unduly hazardous to the safety of the facility, staff or prisoners.

16. The hearing investigator shall obtain all information requested by the hearing officer or clearly explain in writing why it cannot be obtained.

17. All staff members shall cooperate fully with the hearing officer and hearing investigator and shall comply with all requests for information or assistance necessary to conduct a proper hearing, as determined by the hearing officer.

18. All hearing investigator reports and written witness statements shall be either typewritten or done in black ink to facilitate copying of records on appeal. It shall be the responsibility of the warden or corrections center supervisor to ensure that all hearing investigator reports are kept in designated hearing investigator files at the facility where the hearing is held. They shall be kept in chronological order by date of hearing, and in order by prisoner number, so

the record can be retrieved if necessary for an appeal.

19. A copy of any confidential information (as determined by the hearing officer) *must* be kept with the hearing investigator's report and must be clearly marked as confidential by the hearing officer. These confidential statements are exempt from disclosure under the Freedom of Information Act. All photographs shall be attached to the hearing investigator report. Any videotapes which the hearing officer views and makes a part of the record also shall be retained by the institution for at least two years and clearly marked as part of the hearing record.

20. The reports shall be retained for at least two years after the date of the hearing. If a lawsuit is filed, the hearing investigator's report and all attached material (e.g., photographs; videotape) shall be retained until the litigation is completed. A facility will ordinarily be alerted that a lawsuit has been filed when a request is made by the Office of Policy and Hearings (OPH) for a copy of the investigator's report.

21. Physical evidence, other than photographs, may be kept in a separate place and shall be retained for at least 90 days after the hearing, or until litigation is completed if a lawsuit is filed.

Hearing

22. The formal hearing must be held within required time limits, which are set forth in R 791.5501. The day on which a prisoner is locked up or on which the report is reviewed with him/her is not counted in the time limit; however, the day on which the hearing occurs is counted.

23. The hearing officer shall ensure that all relevant evidence and testimony have been presented, and must return the matter to the hearing investigator for further investigation if needed. The hearing officer also shall ensure that the prisoner has had adequate time and opportunity to prepare a defense and that a reasonable and impartial investigation has been conducted.

24. The hearing shall be conducted by a hearing officer under the direction of the Hearings Administrator in the Office of Policy and Hearings. The

prisoner has the right to be present at his/her hearing, but a hearing may be conducted without the prisoner if a finding is made on the record that the prisoner has failed to appear after proper notice is given or is so assaultive or disruptive that the hearing cannot be held with the prisoner present.

25. All prisoners who are segregated or placed on toplock pending a hearing, or are classified to administrative segregation, shall be properly cuffed when brought to a hearing. Other restraints may be applied as deemed appropriate by the institution based on 04.05.112, "Managing Disruptive Prisoners."

26. In making a decision as to whether a prisoner is guilty of a charge, the hearing officer shall consider only evidence which relates to the specific charge or charges or their lesser included violations. Decisions shall be based upon a preponderance of evidence. The formal hearing is not an adversarial proceeding but is rather a fact-finding process in which all parties involved have a responsibility to reveal all relevant evidence whether

supportive or damaging to the person charged. Fairness is to be the paramount consideration of this hearing process.

27. It is not necessary that *Miranda* warnings be given during the hearings process. Statements made by a prisoner at a major misconduct hearing are not admissible in a criminal trial, except for purposes of impeachment or rebuttal. Therefore, a prisoner's silence at a misconduct hearing may be construed against the prisoner by the hearing officer.

Not Guilty Findings

28. If the prisoner is found not guilty or the charges are dismissed, no sanction shall be imposed and a report shall not be filed in any of the prisoner's files. However, a copy of the misconduct report, misconduct hearing report, and hearing investigation, if any, shall be retained by the hearing investigator to assist in responding to requests for rehearing and litigation. The hearing investigator shall also retain these documents in cases where a major misconduct charge was reduced to a minor by the hearing officer.

29. It shall be the responsibility of the warden or center supervisor

to ensure that these reports are properly retained and are not used against a prisoner These reports shall be kept for at least two years.

30. The hearing records for not guilty or dismissed charges shall be reviewed by the warden or designee to monitor for any errors which have been made. Complaints as to hearing officer performance shall be brought to the attention of the Hearings Administrator.

Posting of Hearing Results

31. A copy of the completed Major Misconduct Docket (CAH-991) shall be posted by the facility in an area which is not ordinarily accessible to prisoners, but is readily accessible to staff. It shall be posted within 48 hours of the hearing date and shall remain posted for at least 72 hours. A copy of the docket shall also be retained by the institution for at least two years after the date of the hearing.

CMIS Entry

32. It shall be the responsibility of the institution where the hearing is conducted and Central Office OREP to ensure that all major misconduct

hearing results are entered into CMIS. Guilty findings shall ordinarily be entered by the end of the next business day following the hearing, except that hearing results from camps and REP locations shall be entered within five business days of the hearing.

33. If all charges are [sic] result in a not guilty or dismissed finding, or if the charge(s) are reduced to minors, the hearing results shall be entered into CMIS for research and statistical reporting purposes only, and shall not be accessible by users of CMIS. After entry and auditing of the information on not guilties, dismissals, and minors, the hearing reports used for entry shall be destroyed.

SPECIAL PROVISIONS FOR MENTALLY ILL PRISONERS

Responsibility Determination

K. If a prisoner, the hearing investigator or the hearing officer raises the issue that the prisoner may not be responsible for the misconduct due to mental illness, a request for information on that issue shall be directed to the following:

1. If the prisoner is in a comprehensive care unit (CCU), an

intermediate care program (ICP) a protective environment (PE), or a residential treatment program (RTP), questions shall be directed to the treatment team;

2. For all other prisoners, questions shall be directed to psychological services or the outpatient mental health team, if applicable.

L. A prisoner is not responsible for misconduct due to mental illness if s/he lacks substantial capacity to know right from wrong or is unable to conform conduct to departmental rules. For purposes of this policy directive, mental illness is defined as a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality or the ability to cope with the ordinary demands of life.

M. If the issue of responsibility is raised by the prisoner, and the hearing officer determines on the record that the claim is frivolous, a referral need not be made.

Acute Care

N. A prisoner who is admitted as a patient into an acute care psychiatric facility or unit shall not be subject to the disciplinary process. However, the prisoner's behavior and the immediate therapeutic

response must be thoroughly documented in the prisoner's medical file to ensure that the safety of the prisoner and others is not jeopardized by lack of knowledge of a serious incident.

O. Such incidents shall be discussed in the patent's discharge summary and other appropriate reports to ensure that they are brought to the attention of institutional staff when the prisoner is no longer an inpatient and shall be included in the parole eligibility report.

Comprehensive Care Unit (CCU)

P. An employee who observes a major misconduct violation by a prisoner housed in a CCU which is located in a department facility shall take necessary emergency action to prevent the prisoner from engaging in behavior which is dangerous to self, others or property, and shall confiscate any dangerous or contraband items. However, the prisoner shall not be placed in segregation or on toplock pending a hearing.

Q. If necessary, the prisoner shall be placed in medical seclusion or restraints pursuant to OP-BHC 32.01 "Physical Restraint Usage in the Management of Mentally Ill Patients/Prisoners" which governs restraints for psychiatric patients.

Immediately thereafter, the employee, without informing the prisoner, shall prepare a misconduct report and submit it to designated mental health staff to determine if the prisoner is responsible for the behavior. The misconduct report, however, must be reviewed within 24 hours, as set forth in the review section of this policy. If the prisoner is determined to be not responsible, the misconduct report shall be destroyed and the behavior will be addressed therapeutically. If this occurs, the procedures described above for prisoners in acute care shall be followed to ensure that the behavior is documented.

R. If the prisoner is found to be responsible for his/her behavior, the hearing officer shall be notified of the responsibility determination and the hearing shall proceed as set forth in this policy.

S. Prisoners in a CCU who are given loss of privileges as a sanction shall not be subject to the Loss of Privileges listed on CAJ 113. Rather, only the following privileges may be withheld:

1. Regular exercise yard;

2. Visits in the institution's visiting area;

3. Use of the weight pit;

4. Hobbycraft;

5. Library (General Library only, not Law Library);

6. Gym activities.

T. The hearing officer shall indicate on the misconduct hearing report which privileges are lost. If all of the above privileges are to be withheld, then the hearing officer need only fill in the number of days the sanction will run.

SANCTIONS

U. Upon a finding of guilt in a minor or major misconduct hearing, the hearing officer shall impose one or more of the sanctions set forth in R 791.5505. Hearing officers may consider all relevant information in determining a sanction, including the prisoner's prior record of misconducts and any mitigating or aggravating circumstances. The facility shall provide a record of the prisoner's prior major misconduct for use by the hearing officer in determining an appropriate sanction.

V. Loss of Privileges is a restriction of specified privileges as a sanction given by a hearing officer pursuant to R 791.5505 upon a finding of guilt at a major or minor misconduct hearing. Except

in Residential and Electronic Programs (REP), if a prisoner is given the sanction of Loss of Privileges, the hearing officer shall complete the Loss of Privileges form (CAJ-113), indicating which privileges are lost, and give a copy to the prisoner.

W. If a prisoner is given the sanction of loss of privileges, the institution shall retain copies of the Loss of Privileges form (CAJ-113) with the hearing investigator's report. A copy shall also be retained in the housing unit until the sanction has been served. If a prisoner transfers to a new housing unit or another facility, a record of current and future sanctions shall be forwarded to the receiving facility.

X. A prisoner given the sanction of toplock is restricted to his/her own cell, room, or bunk and bunk area.

1. "Bunk area" is that floor area next to the prisoner's bunk which extends to the mid-point between the adjacent bunks on all sides. If a prisoner is housed in a multiple occupancy cell or room, toplock may consist of placement in a cell/room which is designated as a toplock cell/room. If placed in such a cell/room, the prisoner shall be given the same access to his/her property

which would be provided if housed in his/her own cell/room and shall be treated in all other respects as described in this definition.

2. A prisoner on toplock status shall not leave his/her cell, toplock room or bunk area for any reason without specific authorization from the appropriate staff person. The prisoner may be deprived of use of his/her television, radio and tape player while on toplock status as provided in the institution's operating procedure.

3. The institutional operating procedure *may* authorize a prisoner on toplock status to go to the dining room and to attend college, school or work assignments, or other specified activities, including group religious services. A prisoner shall be released from toplock for regular showers, visits, medical care, including individual and group therapy and law library, unless law books are brought to the prisoner. Also, a prisoner on toplock shall have a minimum of one-hour per day of out-of-cell activity, which may include visits, meals and other required activities. If confined on toplock status for more than 30

consecutive days, a prisoner shall have a 7-day break of one hour per day of yard.

Y. A hearing officer may give credit for time spent in segregation or on toplock pending a hearing, but is not required to do so. The time given by the hearing officer during which the sanction is to be served shall not be changed by the institution.

Z. However, if a prisoner has accumulated a substantial amount of toplock, detention or loss of privileges sanctions, the warden may excuse the sanction periods that have not been served if any of the following conditions exist:

1. At the time of the request, the prisoner has not been found guilty of a major misconduct for at least six months;

2. Upon recommendation of a psychiatrist or psychologist; or

3. If cell space is needed in the segregation unit.

AA. A memorandum which sets forth the sanction periods that have been excused shall be signed by the warden and placed in the prisoner's record office and counselor file. A sanction that has been excused by a warden may not be reinstated at a later date.

BB. If a prisoner is serving a sanction of detention, toplock, loss of privileges, or any combination of these sanctions, whether for major or minor misconduct, s/he shall not be deprived of yard for more than 30 consecutive days without being provided a seven-day break during which the prisoner shall be given the opportunity for yard consistent with his/her status (e.g., toplock – one hour per day; segregation – one hour per day for five days per week).

CC. If the prisoner is serving detention only, s/he shall receive regular administrative segregation yard privileges on a continuing basis after serving 30 consecutive days of detention. However, yard privileges for all segregation prisoners are subject to restriction by written order of the deputy warden as set out in 04.05.120, "Segregation Standards."

DD. Except in OREP, if a prisoner is given the sanction of loss of privileges, the hearing officer shall complete the Loss of Privileges form (CAJ-113) and shall indicate which privileges shall be withheld. Only those privileges listed on the form may be affected by this sanction. Loss of visiting privileges shall be included only if the misconduct relates to the visitor(s) named on the form or

occurred in connection with a visit.

<u>MAJOR MISCONDUCT APPEAL (REQUEST FOR REHEARING)</u>

EE. If either the prisoner or the warden disagrees with the results of a hearing, they may submit a Request for Rehearing. That request must be submitted within 30 days after a copy of the hearing report is received. The Request for Rehearing must be submitted to the Hearings Administrator on the Request for Rehearing form (CSH-418), which shall be available on request from the hearing officer or housing unit staff, and shall be accompanied by a copy of the misconduct report and misconduct hearing report. A departmental request for rehearing shall be approved and signed by the warden.

FF. A rehearing shall be ordered if any of the following occurs:

1. The record of testimony made at the hearing is inadequate for judicial review.
2. The hearing was not conducted pursuant to applicable statutes or policies and rules of the Department and departure from the statute, rule or policy resulted in material prejudice to either party.

3. The prisoner's due process rights were violated.

4. The decision of the hearing officer is not supported by competent, material and substantial evidence on the record as a whole.

5. The hearing officer was personally biased in favor of either party.

GG. A rehearing also may be ordered by the Hearings Administrator on her/his own motion.

HH. If the request for rehearing is denied, or the prisoner is not satisfied with the results of a rehearing, the prisoner may appeal to Circuit Court, as set forth in MCLA 791.255.

OTHER ACTIONS RESULTING FROM MISCONDUCT

II. In addition to the sanctions imposed by the hearing officer, a prisoner who is found guilty of a major misconduct violation may be referred to the warden for forfeiture of earned good time or disciplinary credits pursuant to R 791.5513. In all cases involving assaultive behavior, forfeiture of good time or disciplinary credits shall be ordered if the prisoner is found guilty of the misconduct.

JJ. The warden may also issue a notice of intent to the prisoner informing him/her that special good time or special disciplinary credits may not be granted. A prisoner shall automatically not earn the disciplinary credits or good time which would have been earned during any month in which s/he commits a major misconduct violation which subsequently results in a finding of guilt.

KK. The prisoner who is found guilty of misconduct may also be referred to other appropriate staff or services, such as a psychological or psychiatric evaluation, counseling, program classification committee, or security classification. All prisoners who are found guilty of a nonbondable major misconduct shall be reviewed by the Security Classification Committee to ensure that the prisoner is still at the appropriate security and risk level.

LL. Reclassification to administrative segregation based solely on a major misconduct guilty finding may be done using the Security Reclassification Notice (CSO-423); an additional hearing is not required.

OPERATING PROCEDURES

MM. Wardens and the Administrator of the Office of Residential and

Electronic Programs shall ensure that the operating procedures necessary to implement this policy are in effect within 60 days of its effective date. Wardens shall submit a copy of their operating procedures to the appropriate Regional Prison Administrator (CFA) for approval.

III. AUDIT ELEMENTS

NN. A Primary Audit Elements List has been developed to ensure compliance with this policy by providing staff with a tool for self auditing. The List shall be used by wardens, Regional Administrators, the Hearings Administrator and the Administrator of OREP for auditing purposes on an annual basis unless more frequently required by the Director or Deputy Director and shall be retained onsite and made available to the Internal Auditor when requested.

APPROVED: /s/ Kenneth L. McGinnis 5/17/94
Kenneth L. McGinnis, Director Date

ATTACHMENT A

MAJOR AND MINOR MISCONDUCT

Attachments B and C list prisoner behavior which is prohibited and subject to disciplinary sanctions. The left-hand column lists and defines the violations; any

behavior that fits the definition is misconduct. In the right-hand column are specific examples of behavior fitting under the rule violation. These are just *examples*; other actions that fit the violation definition are also misconduct even though they are not mentioned in the right-hand column.

In addition to the violations which follow, three other kinds of charges are possible: accomplice, attempt, or conspiracy to commit a specific violation.

1. ACCOMPLICE – A prisoner who assists another to commit a specific misconduct, or, after it is committed, conceals the violation from the authorities. The charge should be written as "Accomplice to Assault," for example, and the report must describe what the prisoner allegedly did. Examples of being an accomplice include: acting as a 'lookout', holding down a victim, allowing use of cell/room for commission of a violation.

3. ATTEMPT – A prisoner intends to commit a specific rule violation *and* does something towards committing it, even though s/he may not have succeeded.

2. CONSPIRACY – A prisoner intends to commit a specific rule violation *and* agrees with *at least one other person* to commit the violation. No action is necessary.

A prisoner charged with a misconduct violation for possession of an item found in an area over which s/he has control, and has been assigned responsibility for, will be presumed to have possessed the item. The prisoner shall have the burden of proof in rebutting this presumption. A prisoner's area of control includes:

1. Assigned room or cell, including door track or frame;
2. If assigned to a multiple occupancy room or area, that part of the room assigned to the prisoner, including bed, locker, and surrounding wall, floor and ceiling space;
3. Any personal property belonging to the prisoner, unless it has been reported as stolen;
4. Area of work or school assignment for which prisoner is responsible.

Many rule violations necessarily include other less serious violations. A lesser included violation would contain some, but not all, elements of the greater charge. For example, a "lesser included" violation of assault and battery is threatening behavior; insolence is a lesser included violation of threatening behavior; and creating a disturbance is a lesser included violation of inciting to riot. If a prisoner is charged with misconduct, and the evidence does not support the particular violation charge, but does establish a lesser included violation, the hearing officer has the authority to find the prisoner guilty of the lesser included violation.

ATTACHMENT B

CMIS CODE (See Note Below)	*	MAJOR RULE VIOLATIONS	COMMON EXAMPLES
001 (Escape from minimum or community custody)	*	*Escape* Leaving or failing to return to lawful custody without authorization;	Leaving from hospital trip or while housed at hospital; hiding from authorities even if still on

050 (escape from secure facility)		failure to remain within authorized time or location limits (a) when released for work pass; (b) while on a public works crew; (c) while residing in a community residential home under electronic monitoring; or (d) during an authorized absence from work, school or other activity while residing in a community corrections center.	prison property, should be attempted escape; unauthorized change of approved destination on work pass or in community programs.
002		*Felony* Any act that would be a felony under state law is also a major misconduct violation. Reference shall be made to the specific statutory citation in all cases where this charge is alleged.	Breaking and entering – MCLA 750.110. (NOTE: Use this charge only if there is no other specific violation which is applicable.)
010	*	*Homicide* Causing the death of another person by any means.	

011 (prisoner victim) 015 (staff victim) 016 (other victim)	*	*Assault and Battery* Physical attack on, or intentional, non-consensual touching of another person done either in anger or with the purpose of abusing or injuring another; physical resistance of or physical interference with an employee. Injury is not necessary, but contact is.	Attack by one or more persons; striking with feces or other objects; spitting on another person. (Note that the victim of an assault and battery should *not* be charged with a violation of this rule.)

NOTE: The first number of the code for accomplice to any rule violation should be 1, for attempt 2, and for conspiracy 3 (e.g, attempted escape would be 201).

012	*	*Threatening Behavior* Words, actions or other behavior which expresses a intent to injure or physically abuse another person. Such misconduct includes attempted assault and battery.	Threats of sexual assault made by one prisoner to another prisoner; writing threatening letters to another person; threats made to a third person which are intended to place the person threatened in fear of harm.

*** Mandatory "nonbondable" charges**

013	*	*Sexual Assault* Sexual penetration of, or sexual contact with, another person without that person's consent; non-consensual physical contact for sexual purposes.	Rape; intentional touching of sexual area (e.g., buttocks, breasts, genitals) without consent; kissing or embracing without consent of one who is kissed or embraced.
014	*	*Fighting* Physical confrontation between two or more persons, including a swing and miss, done in anger or with intent to injure.	Fights between prisoners, whether with fists, broom handles or other weapons.
017	*	*Failure to Disperse* Failure or refusal of a prisoner to leave an area in which a disturbance is occurring when the prisoner is physically above to leave; includes obstruction of staff at the scene of the disturbance. Disturbance is defined as a fight between prisoners, subduing or taking into custody of a prisoner or prisoners by staff, destruction of	Preventing a staff member from coming to the aid of other staff; remaining at the scene of a fight to observe or offer encouragement to combatants; blocking staff who are removing a prisoner from an area.

		property, or any similar action or occurrence.	
020		*Disobeying a Direct Order* Refusal or failure to follow a valid and reasonable order of an employee.	Refusal to submit to a shakedown; fleeing from an officer after being directed to stop.
021		*Possession of Forged Documents; Forgery* Knowingly possessing a falsified or altered document; altering or falsifying a document with the intent to deceive or defraud; unauthorized possession or use of the identification card, prisoner store card, pass, or detail of another prisoner.	A fake pass, application, furlough paper, etc. which is represented to be true.
022	*	*Incite to Riot or Strike; Rioting or Striking* Advocating or instigating actions which are intended to seriously endanger the physical safety of	Encouraging other prisoners to take group action to injure staff, destroy property, or disrupt normal operations; refusal of prisoners as a group to leave the yard when

		the facility, persons, or property or to disrupt the operation of the facility by group cessation of normal activity; participation in such action. Joining others in unauthorized work stoppage.	instructed by staff to do so.
023		*Interference with the Administration of Rules* Acts intending to impede, disrupt, or mislead the disciplinary process for staff or prisoners, including failure to comply with a loss of privileges sanction imposed by a hearing officer.	Intimidating or tampering with an or [sic] witness; tampering with or [sic] evidence; interfering with an employee writing a misconduct report; making false accusations of misconduct against another prisoner or staff which results in disciplinary action being initiated against that person. (NOTE: Should not be charged as retaliation for the writing of a grievance; if written as result of a grievance, must be shown that prisoner knew allegation was false when s/he made it and intentionally filed a false grievance. Ordinarily, the

		statement of staff member refuting the claim will not be sufficient.)
024	*Bribery of an Employee* Offering to give or withhold anything to persuade an employee to neglect duties or perform favors.	
026	*Insolence* Words, actions, or other behavior which is intended to harass, or cause alarm in an employee.	Abusive language, writing or gesture directed at an employee.
027	*Destruction or Misuse of Property with Value of $10 or More* Any destruction, removal, alteration, tampering, or other unauthorized use of property which was a value of $10 or more.	Tampering with locking device; use of door plug; destruction of property belonging to another person.
028	*Failure to Maintain Employment* Failure of a prisoner in community residential	(NOTE: Applies only to prisoners in community programs and on Work-Pass)

		or work-pass programs to immediately report to appropriate department staff any absence from employment or training for illness, layoff, termination, or any other reason; failure to obtain prior staff approval for planned absences from, or voluntary termination of, employment or training.
030	* *Possession of Dangerous Contraband* Unauthorized possession of weapons, explosives, acids, caustics, materials for incendiary devices, escape materials or exempt policy directives, operating procedures or other restricted documents; possession of critical tools and materials or dangerous	Possession of gasoline, butane lighter, sulphuric acid, lye, prison-made knives, pipe bomb, rope and grappling hook, stored bodily fluids or anything which could be used as a weapon; possession of a screwdriver, hammer, hobbycraft knife, etc. if outside authorized area; possession of a road map for any area within the State of Michigan or any adjacent state;

	tools and materials as defined by policy; includes failure to return any item covered by this definition which is signed out for a work or school assignment or any other purpose.	possession of any diagram or other drawing of the layout of a correctional facility.
031	*Possession of Money* Possession of unauthorized amounts of money or money from unauthorized sources, money is defined as either cash or a negotiable instrument.	No money is authorized in institutions. Institutional tokens do not fall under this rule.
032	*Creating a Disturbance* Actions or wards of a prisoner which result in disruption or disturbance among others, but which does not endanger persons or property.	
033	*Sexual Misconduct* Consensual touching of the sexual or other parts of the body	Kissing, hugging, intercourse, sodomy. Exposure of sexual organs when prisoner knows officer

	of another person for the purpose of gratifying the sexual desire of either party, except that an embrace of a visitor at the beginning and end of a visit, or holding hands with a visitor during a visit is not sexual misconduct; intentional exposure of the sexual organs, to another person in a location or manner where such exposure has no legitimate purpose; imitating the appearance of the opposite sex; words or actions of a sexual nature directed at another person in order to harass or degrade that person.	will be making rounds. Wearing clothing of the opposite sex. Wearing of makeup by male prisoners. Whistling at and making sexual remarks to another person; making propositions of a sexual nature. (NOTE: Threats of sexual *assault* should be charged as Threatening Behavior.)
034 (alcohol) 039 (marijuana)	*Substance Abuse* Possession, use, selling, or providing to others, or being under the	Narcotics paraphernalia includes such items as marijuana and "crack" pipes, needles, syringes,

040 (heroin/ morphine) 041 (cocaine) 042 (other substance) 043 (drug test refusal) 044 (narcotics paraphernalia)	influence of, any intoxicant, inhalant, controlled substance (as defined by Michigan statutes), alcoholic beverages, marijuana or any other controlled substance which is used to cause a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulling of the senses or nervous system; unauthorized possession of prescribed or restricted medication; possession of narcotics paraphernalia; failure of refusal to voluntarily submit to substance abuse testing which is requested by the Department for the purpose of determining the presence in the prisoner of any substance included in this charge.	etc. (that is, items used to administer narcotics but does not include such items as "roach clips," and cigarette papers.

035	*Unauthorized Occupation of Cell or Room* Being in another prisoner or prisoners' cell, room, or clearly defined living area without specific authorization from staff; being present in any cell, room, or other walled area with another prisoner or prisoners or a member or members of the public without staff authorization.	Two prisoners in a "one-person" cell; being in a room cell, bay, cubicle or other area to which the prisoner is not assigned; two prisoners in a restroom stall; prisoners and member of the public in prisoners' restroom or visiting area restroom.
036	*Out of place or Bounds / AWOL* Being within the lawful boundaries of confinement and not attempting to escape, but in a location without the proper authorization to be there; absent from where one is required to be; breaking toplock without authorization; being outside assigned housing	"Skating" in another block; no pass; no I.D. card; failure to return on time from furlough, but returned within two hours of deadline. ("Skating" in own housing unit during the day is a minor unless on toplock status.) Failure to be where required by detail.

	unit without prisoner identification card; being absent from required location during count.	
037	*Theft; Possession of Stolen Property* Any unauthorized taking of property which belongs to another; possession of property which the prisoner knows, or should have known, has been stolen.	
038	*Gambling; Possession of Gambling Paraphernalia* Playing games or making bets for money or anything of value; possession of gambling equipment, or other materials commonly associated with and intended for wagering.	Possession of dice or betting slips. Point spreads, items used as counters in a card game, and similar items.

ATTACHMENT C

MINOR RULE VIOLATIONS	COMMON EXAMPLES
(All are coded 049)	
Misdemeanor Any act that would be a misdemeanor if prosecuted under Michigan law is also a minor misconduct violation, unless specified elsewhere as a major. Reference must be made to the specific statutory citation in all cases where this charge is alleged.	Larceny under $100 – MCLA 750.356.
Abuse of Privileges Intentional violation of any departmental or institutional regulation dealing with prisoner privileges unless it is specified elsewhere as a major.	
Contraband Possession or use of non-dangerous property which a prisoner has no authorization to have, where there is no suspicion of theft or fraud.	Possession of unauthorized items or anything with someone else's name or number on it; having excessive store items or tokens.
Health, Safety or Fire Hazard Creating a health, safety or fire hazard by act or omission.	Dirty cell; smoking in unauthorized areas; lack of personal hygiene.

Temporary Out of Place / Bounds
in own housing unit during the day out of place for a brief time or adjacent to where supposed to be.

Unauthorized Communications
Any contact, by letter, gesture or verbally with an unauthorized person or in an unauthorized manner.

Love letters to another prisoner; passing property on a visit either directly or through a third person.

Violation of Posed Rules
Violation of rules of community residential programs, housing units, dining room, furlough, work or school assignment which is not covered elsewhere.

Violation of kitchen sanitary regulations; wasting food; excessive noise in housing unit, playing TV or radio without earphone; unauthorized driving of motor vehicle; failure to report income in OREP.

Horseplay
Any physical contact, or attempted physical contact, between two or more persons, done in a prankish or playful manner without anger or intent to injure or intimidate.

Towel snapping at others in showers, playful body punching; playing "grab-ass."

Lying to an Employee
Knowingly providing false information to an employee.

Giving a false name, number or room/cell assignment. (*Note*: making false accusations of misconduct is included under the major violation of interference with administration of rules.)

Destructive or Misuse of Property with Value of Less Than $10
Any destruction, removal, alteration, tampering, or other misuse of property which has a value of less than $10.

Excessive Noise
Creation of sound, whether by use of human voice, a radio, TV, or any other means, at a level which could disturb others.

Playing TV or radio above allowable level; banging objects against cell bars.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Caption Omitted In Printing]

MICHIGAN DEPARTMENT OF CORRECTIONS

MAJOR MISCONDUCT REPORT 4835-4240 5/92
(Please Print or Type) CSJ-240 A

Prisoner Number	Prisoner Name	Institution	Violation Date
213302	Mease-X	SMF	5-21-97

Time & Place of Violation 0744 Unit 3 Chowhall	Housing Unit 3
Room/Cell/Bunk 227	Reporting Staff Member's Name & Clock No. M Close 011216

Name of Major Misconduct Charge and CMIS Code
012 Threatening Behavior

Describe Violation:

At 0744 While watching 3 block chowlines, I made direct eye contact with prisoner Mease-X #213302 3-227. Mease-X contorted his face and made a statement that I believe was directed at me but I could not understand him over the room noise. I then walked into the chowhall to speak with Mease, I then noticed Mease-X was angerly [sic] walking towards me and looked very hostile, I immediately stopped. Mease kept walking and stopped approximately 2 inches from my face, starring directly into my eyes and breathing heavily on my face. This officer was in fear of being physically assulted and or injured. Mease's face was contorted with veins bulging at his temples. At this point Officer Metevia immediatly handcuffed Mease-X and escorted him to unit 2.

Mease-X was identified by prior contact and Unit #3 Master Count board

R. Metevia, D. McIntire	Misconduct Written Date: 5/21/97 Time: 1115

Other Employee Witnesses? (List)	Reporting Staff Member's Signature /s/ M Close

Reviewing Officer's Action
Location/Verification of Evidence _____

Status Pending
Hearing: ☐ Bond ☐ Toplock ☐ Segregation ☐ Other
Reason
(if non-bond): ☒ Non-Bond List
prisoner placed on T-seg because of above misconduct
☐ Bond Revoked (Must give reason)

Date and Time Given This Status: (Who notified in housing unit) 5/21/97 1251 Rio Bonnan	If Status Changed, Give Date
Hearing Investigator Requested? ☐ No ☒ Yes	Witnesses Requested? ☐ No ☒ Yes
Relevant Documents Requested? ☐ No ☒ Yes (list)	will submit
will submit	Hearing Date 5/26/97
Additional Comments:	NOTE: Your statement at this hearing will not be admissible in a criminal trial on this matter except for purposes of impeachment or rebuttal.
will submit	

I waive 24 Hour Advance Notice (Prisoner's Signature)	Date of Review 5/21/97	Time of Review 1255

NOTE: IF YOU ARE FOUND GUILTY OF MAJOR MISCONDUCT:

(1) You may be classified to a higher level of security, including Administrative Segregation.

(2) You will forfeit the disciplinary credit or good time earned for the month in which the misconduct occurred.

(3) You may lose accumulated good time or disciplinary credits, if ordered by the Warden

/s/ Sgt. K. Goheen 11225

(Print or Type Reviewing Officer's Name & Clock No.)

/s/ [Illegible]

(Reviewing Officer's Signature)

prisoner refused to sign copy [illegible] 5/21/97 1256

(Prisoner's Signature)

I have received a copy of this report. My signature verifies receipt only and does not mean that I agree with this report.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Caption Omitted In Printing]

MICHIGAN DEPARTMENT OF CORRECTIONS — 4835-4241 9/91
MAJOR MISCONDUCT REPORT — CSJ-240 B

Prisoner Number	Prisoner Name	Institution	Violation Date
213302	Mease-X	SMF	5-21-97

Charge: Threatening Behavior 012

If charge changed by H. O.: insolence 026	Plea ☐ GUILTY ☒ NOT GUILTY
Major Misconduct Report Read To and Discussed with Prisoner (Check if Applies) ☒	No Hearing Investigation Requested ☐ (Check if Applies)
Hearing Investigation Read To and Discussed with Prisoner (Check if Applies) ☒	

EVIDENCE/STATEMENTS IN ADDITION TO MISCONDUCT REPORT:

The resident stated that c/o Close was staring at him as he ate and then made flinching motion towards him and he felt threatened by the officer's body languagge. Statements from RUO McIntire, RUO Metavia, Sgt. Tipton, RUO Bellows, and inmates Sc rews, Jones-el, Holland, Walker and the resident were read aloud.

REASONS FOR FINDING:

The hearing officer finds from a comparison of the report, witness statements of staff and the resident that the resident and officer were staring at each other and the officer approached the resident and the resident got up from his seat in an alarming manner and stood face to face with the officer. The resident's statement indicates he was angry at the officer for staring at him and the resident's actions in this context indicates that he acted with the intent to alarm and harass the officer by standing and facing off the approaching officer. The resident made no threats of physical injury or specific threats of assault thus the charge is changed to Insolence.

FINDINGS: CMIS Code

CHARGE NO. 1 ☒ GUILTY ☐ NOT GUILTY
☐ DISMISSED 026

CHARGE NO. 2 ☐ GUILTY ☐ NOT GUILTY
☐ DISMISSED ___

CHARGE NO. 3 ☐ GUILTY ☐ NOT GUILTY
☐ DISMISSED ___

CHARGE NO. 4 ☐ GUILTY ☐ NOT GUILTY
☐ DISMISSED ___

DISPOSITION(S):

7 Days of Detention ___ Days of Toplock

Begins 5-27-97 Ends 6-3-97

30 Days Loss Privileges _____

_____ Credit Days

Begins 6-3-97 Ends 7-3-97

$___ Restitution ___ Hours of Extra Duty

HEARING OFFICER'S NAME & CMIS CODE (Typed)	Major Misconduct Hearing Report personally handed to Prisoner by Hearing Officer this date (check if applies) ☒
Arvid Perrin 015	

HEARING OFFICER'S SIGNATURE	Major Misconduct Hearing Report Given to Staff Member by Hearing Officer for Delivery to Prisoner this date (check if applies) ☐	
/s/ Arvid Perrin	Date of Hearing 5-27-97	(Name & CLock No. of Staff Member)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

[Caption Omitted In Printing]

MICHIGAN DEPARTMENT OF CORRECTIONS — 4835-0113 10/89
LOSS OF PRIVILEGES — CAJ-113

Prisoner Name	Number	Cell/Unit	Charge(s)
Mease-X	213302		026

Below is a list of privileges provided to prisoners. Because you have been found guilty of major/minor misconduct, you will lose (circle either (a) or (b):

(a) All privileges listed below.

(b) The privileges listed below which are marked with a check.

This loss of privileges is for 30 days and will begin on 6-3-97 and end on 7-3-97
(Date) (Date)

(Maximum for major misconduct is 30 days: maximum for minor is 14 days.)

___ Day Room; Card Room, Social Room, Game Room, Pool Room

___ Exercise Facilities, such as Field House, Gym, Weight Room, Pool Room

___ Group Meetings, such as Bible Class, La Causa, Jaycees, etc.

___ Hobbycraft

___ Prisoner Store

___ Leisure Time or Special Activities, such as outside singing groups, athletic tournaments, social passes outside the facility, etc.

___ Library (General Library only; NOT Law Library)

___ Movies

___ Music Practice; Musical Instrument

___ Outside visiting area

___ Radio; Tape Player

___ Recreational Details

___ Study Room; Quiet Room

___ Telephone (except calls to/from designated attorney or Ombudsman)

___ T.V./T.V. Room or Area

___ Visits with _____ (Name of Specific Visitor(s) (Applicable only if name(s) are filled in)

___ Yard (Outside and Unit)*

[COPY TO PRISONER MAY 30, 1997]

/s/ Arvid Perrin
Signature of Hearing Officer & Date 5-27-97

* In NO case shall a prisoner be deprived of both of these privileges for more than 30 consecutive days; a break of at least 7 days must be allowed before another 30-day period may begin.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
Theodore Levin United States Courthouse
231 W. Lafayette, Room 564
Detroit, Michigan 48226

Prisoner Civil Rights Complaint for Cases Brought Under 42 U.S.C. § 1983

(Filed Jun. 2, 1998)

Plaintiff's Information

Name
Shakur Muhammad aka John E. Mease

Inmate Number
213302

Place of Confinement
Ionia Maximum Correctional Facility (ICF)

Street	*City*	*State*	*Zip Code*
1576 W. Bluewater Hwy	Ionia	Michigan	48846

Any additional plaintiffs to this action should be listed on a separate 8½ x 11" sheet of paper and securely attached to the back of this complaint. Please provide names, inmate numbers, and addresses for each plaintiff.

Defendant's Information *(This information must be current)*

Name	*Position*
Mark Close	Correctional officer

Street or P. O. Box Number
4713 West M-61

City	*State*	*Zip Code*
Standish	Michigan	48658

Are you suing this defendant in his/her <u>personal</u> or <u>official</u> capacity? [✓] *Yes* [ ] *No*

Any additional defendants to this action should be listed on a separate 8½ x 11" sheet of paper and securely attached to the back of this complaint. Please provide their names, positions and current addresses, and the capacity (personal or official) in which you are suing the defendants.

I. PREVIOUS LAWSUITS

Have you begun any other lawsuits in state or federal court relating to your imprisonment?

YES [✓] NO [ ]

If "YES", complete following section; if "NO", proceed to Part II.

Please list all prior civil actions or appeals that you have filed in federal court while you have been incarcerated.[1]

1)
Docket Number:
97-1226

Name of Court:
U.S. Court of Appeals Cincinnati, Ohio

Parties (Caption or Name of Case):
S. Muhammad aka Mease v. Hartley, Close, Et. al.

Disposition:
Affirmed

[1] This notification is pursuant to 28 U.S.C. § 1915(g).

2)
Docket Number:
96-10053-BC

Name of Court:
S. Muhammad aka Mease v. Hartley, Close, Et. al.

Parties (Caption or Name of Case):
U.S. District Court Eastern District of Michigan
Northern Div

Disposition:
Dismissed

3)
Docket Number:
94-74926(36)-DT

Name of Court:
U.S. District Court Boston District of Michigan
Southern Div.

Parties (Caption or Name of Case):
Mease v. Toth, Close, Et. al.

Disposition:
Dismissed

Note: Any additional civil actions should be listed on a separate sheet of 8½ x 11" paper.

4. # unknown
U.S. District Court Eastern District of Michigan
Mease v. Cobb
Dismissed

5. # unknown
U.S. District Court Western District of Michigan
Mease v. Jegla
Dismissed

II. ADMINISTRATIVE REMEDIES

1. If you are in the custody of the State of Michigan or one of its subdivisions, did you:

File a grievance with the Step 1 Grievance Coordinator?	YES [ ]	NO [✓]
Appeal to the Step 2 Grievance Coordinator?	YES [ ]	NO [✓]
Appeal to the Step 3 Grievance Coordinator?	YES [ ]	NO [✓]
Seek a rehearing?	YES [ ]	NO [✓]
Seek State Circuit court review of a misconduct hearing?	YES [ ]	NO [✓]

If you did not take one or more of the steps, please explain why:

Not grievable because of misconduct, letters regarding issue was sent prior to and following occurance [sic] to prison Director/Warden

2. If you are a federal detainee, prisoner, or parolee and if your claim concerns parole, did you appeal to the National Appeals Board of the United States Parole Commission?

YES [ ] NO [ ]

If not, explain why:

N/A

3. If you are a federal detainee, prisoner, or parolee, and if your claim involves something other than parole, did you:

Attempt to resolve your complaint informally?	YES [ ]	NO [ ]
File a formal complaint?	YES [ ]	NO [ ]
Appeal to the warden?	YES [ ]	NO [ ]
Appeal to the Regional Director of the Bureau of Prisons?	YES [ ]	NO [ ]
Appeal to General Counsel for the Bureau of Prisons?	YES [ ]	NO [ ]

If not, explain why: N/A

III. STATEMENT OF FACTS

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include the names of other people, dates, and places involved in the incident. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim on blank 8½ x 11" sheets of paper and attach them to the last page of this complaint.

1. On 5-21-97, Plaintiff was incarcerated at Standish Maximum Facility (SMF), Unit 3 in Standish, Michigan.

2. On 5-21-97, Defendant was employed as a correctional officer at SMF and was assigned to Unit 3. Defendant was

standing with Sgt. Tipton and c/o Metiva while observing the dining area in Unit 3.

3. On 5-21-97, Plaintiff entered the Unit 3 dining area, got his breakfast tray and seated himself. Plaintiff began eating and noticed that Defendant was staring at him. Plaintiff continued eating and about half way through his meal noticed that Defendant was still staring at him. Plaintiff stared back. Defendant, while continuing to stare, then made a fighting stance towards Plaintiff. Plaintiff turned away and began to drink his coffee, but saw Defendant coming into the dining area at a fast pace with his face contorted. Plaintiff, being threatened by the Defendant's prior body language and his fast approach, got up from the table and walked directly towards the only exist and towards the Defendant. When Defendant and Plaintiff came within a foot of one another, Defendant stated, "whats up", while staring angerly [sic] at Plaintiff. Plaintiff did not respond. c/o Metiva and Sgt. Tipton handcuffed Plaintiff and took him to a Unit 2 detention cell. (See Exhibit A, major misconduct hearing record.)

4. Three to four hours later, Defendant falsely charged Plaintiff with threatening behavior and intentionally deleted the actual occurances [sic] from the report. (See Exhibit A, major misconduct report of 5-21-97.)

5. On 5-27-97, a major misconduct hearing was held and Plaintiff was acquitted of threatening behavior but found guilty of insolence for "getting up from his seat in an alarming manner and standing face to face with the officer." (See Exhibit A, hearings report.) Plaintiff was sanctioned to 7 days detention and 30 days loss of privileges as a result of the misconduct charge.

6. Plaintiff has filed two 42 USC § 1983 civil suits against Defendant price to this presence [sic] claim, and institutional grievances at SMF. (See Exhibit B, the court documents verifying Defendant as a party in prior § 1983 suits, and Exhibit C, SMF grievances against Defendant!) (See note 1 at bottom page 4B.)

7. Due to Defendant's retaliatory conduct, Plaintiff suffered physically as he was subjected to 43 days of unjust loss of his liberty and Plaintiff suffers mental and emotion [sic] anguish as a result of Defendant's threatening conduct and retaliatory disciplinary punishment.

Claim

Defendant framed Plaintiff in retaliation for the Plaintiff's exercise of his First Amendment rights.

S. Muhammad
5-1-98

Note #1. Exhibits A through C will be forwarded to the court, defendant, and his attorney when the case is formally given a case number, as the MDOC refuses to copy legal Exhibits for indigent prisoners for non-pending litigation. This rule requires Plaintiff to have a case number before he can get legal copies.

IV. RELIEF

State briefly and exactly what you want the Court to do for you.

Plaintiff requests the misconduct charge expunged from his file because Defendant used the prison disciplinary

process to retaliate. Plaintiff requests $4,300.00 in compensatory damages and $5,000.00 in punitive damages for the physical and mental injuries sustained during his 43 days of loss of liberty due to Defendant's retaliatory conduct.

I declare under penalty of perjury that the foregoing is true and correct.

May 1st, 1998 (Date) /s/ Shakur Muhammad (Your Signature)

United States District Court
Eastern District Of Michigan
Northern Division

SHAKUR MUHAMMAD,

Plaintiff,

v.

MARK CLOSE, in individual and official capacity,

Defendant.
_____/

Case No.
98 CV 10153BC
Hon. Robert H. Cleland
Mag. Charles Binder

AMENDED CIVIL RIGHTS COMPLAINT

This is a § 1983 civil rights complaint filed by Shakur Muhammad, a state prisoner, alleging violation of his constitutional rights and seeking compensatory, punitive and any other just and equitable relief this court deems appropriate. The Plaintiff requests a trial by jury.

Jurisdiction

1.) This is a civil rights action pursuant to 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. § 1343.

Parties

2.) On 5-21-97, Plaintiff was incarcerated at Standish Maximum Facility (SMF), Unit 3 in Standish, Michigan.

3.) On 5-21-97, Defendant was employed as a correctional officer at SMF and was assigned to Unit 3.

Statement Of Facts

4.) On 5-21-97, Plaintiff entered the Unit 3 dining area, got his breakfast tray and seated himself. Plaintiff began his meal and noticed that Defendant was staring at him through the hallway window. Plaintiff continued his meal and about half way through, noticed that Defendant was still staring at him. Plaintiff stared back. Defendant, while continuing to stare, then made a fighting stance towards Plaintiff. Plaintiff turned away and began to drink his coffee, but saw Defendant coming into the dining area at a fast pace with his face contorted. Plaintiff, being threatened by the Defendant's prior body language and his fast approach, got up from the table and stood face to face with Defendant. When Defendant was within a foot of me, he stated, "whats up", while staring angerly [sic] at me. Plaintiff did not respond. c/o Metiva and Sgt. Tipton handcuffed Plaintiff and took him to a Unit 2 detention holding cell. (See Exhibit A, major misconduct hearing record.)

5.) Three to four hours later, Defendant falsely charged Plaintiff with threatening behavior and intentionally deleted the actual occurances [sic] from the report. (See Exhibit A, major misconduct report of 5-21-97.)

6.) On 5-27-97, a major misconduct hearing was held and Plaintiff was acquited [sic] of threatening behavior but found to be guilty of insolence for "getting up from his seat in an alarming manner and standing face to face with the officer." (See Exhibit A, hearings report.) Plaintiff was sanctioned to 7 days detention and 30 days loss of privileges as a result of the misconduct charge.

7.) Plaintiff has filed two 42 U.S.C. § 1983 civil suits against Defendant prior to this present claim, and institutional grievances at SMF. (See Exhibit B, the court documents verifying Defendant as a party in prior § 1983 suits, and Exhibit C, SMF grievances against Defendant.)[1]

8.) Due to Defendant's retaliatory conduct, Plaintiff suffered physically as he was restrained and subjected to 6 days of unjust loss of liberty. Plaintiff also suffers mental and emotional anguish as a result of defendant's threatening conduct and retaliatory disciplinary action.

Claim

Defendant framed Plaintiff in retaliation for the Plaintiff's exercise of First Amendment rights.

Note #1. Plaintiff is unable to acquire copies of the above stated Exhibits at present due to lack of funds. However these Exhibits are the exact same Exhibits from the Original 5-1-98 complaint. Plaintiff cannot obtain copies until May of 99, and will forward at that time.

Relief

Plaintiff requests $10,000.00 in compensatory and punitive damages for the physical, mental and emotional injuries sustained as a result of defendant's retaliatory acts.

"I declare under penalty of perjury that the foregoing is true and correct."

April 5th, 1999

Respectfully submitted,
Shakur Muhammad
ICF #213302
1576 W. Bluewater Hwy.
Ionia, Michigan 48846

Proof Of Service

The undersigned certifies that copies of the foregoing "Amended Complaint" have been served upon the clerk of this court and the defendant's attorney by U.S. mail postage pre-paid at Ionia, Michigan on April 5th, 1999.

/s/Shakur Muhammad

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SHAKUR MUHAMMAD,
(#213302) a/k/a John Mease,

Plaintiff,

vs.

MARK CLOSE,

Defendant.

Case No. 98 cv 10153 BC
Hon. Victoria A. Roberts
Mag. Charles Binder

DEPOSITION

of SHAKUR MUHAMMAD, taken before Lynne K. Haf, Notary Public, at the Ionia Maximum Correctional Facility, 1576 West Bluewater Highway, Ionia, Michigan, Tuesday, July 11, 2000, noticed for 10:00 A.M.

* * *

[9] A Um-hum.

Q Is that a yes?

A Yes.

Q And down about halfway where it says: Prisoner antagonistic to law enforcement officers, what is written in that section?

A Whoever wrote the report made allegation that I threatened to kill guards and a judge.

Q Now, how long were you in Kent County Correctional Facility?

A I'm not sure. A little over three months, though.

Q Was this early?

A Pardon?

Q Was this a while ago? Was this like early 1990s or what?

A Yes, it was in mid-1990.

Q Okay.

A May/June through November – December 1, like I said, I was taken out of there.

Q Let's –

A This is February 12, 19–

Q Let's get to really the substance of your lawsuit. Would you just describe in your own words what happened.

A Got up, went to chow with everybody else on the [10] rock. Got to the chow hall, got my tray. Sit myself at the normal seat where I sit at. And as I sat down, I noticed that Sergeant Tipton, Defendant Close and Officer Matevia, M-A-T-E-V-I-A, they were standing outside the window that I was facing towards talking to one another.

I noticed that Close was staring at me, had a smile on his face. So I went on about my business knowing that we had prior problems in the past which included grievance litigation and different problems like that. So I went on about preparing my breakfast.

As I sit there, other prisoners came and sit down, Prisoner Walker, Jones-El, Screws. Anyway, we sit down. They sit down, and we started talking and stuff. And as we was talking, preparing our food, eating our food and so forth, I continually noticed Mark Close staring at me.

Q Now, at this point, how far away was Mark Close?

A See that table there?

Q Okay. The –

A If I was sitting on the inside quarter, he would be standing out in the hallway, where that window is – or where that chalkboard is.

Q Okay. So he's really in a different room looking [11] through a window?

A He's standing in the hallway looking through the window. If that door was open, it would be the same circumstance.

Q Okay. So there's a window between you, and it was, what would you say, about 30 or 40 feet away? Is that –

A No, no, no, no. That's not 30 or 40 feet. That's no more than 10, not even 10 – not even 10 feet.

Q Oh, okay. So you're saying the table by there – that's about where you were sitting –

A Right.

Q – and he was out – okay.

And although there was a partition between you, you say it was about eight or ten feet?

A No more than – no more than ten feet.

Q Okay. Go on.

A Anyway, he was standing out in the hall, kept continuing to stare. And about halfway through the meal,

I noticed he was continuing to stare, and I was taking it like he was trying to intimidate me and stuff, so I gave it back at him, and I stared back at him. He made this gesture towards me like this (indicating).

Q Okay. So this gesture is his hands are sort of [12] straight out in front about –

A Like this (indicating).

Q About, what is that, two and a half, three feet apart. So were his palms up?

A Yes.

Q Okay.

A He's making this gesture, hunched, making this gesture like this, coming forward.

I turned away from him. I go to drink my coffee, like I'm not paying attention to you, nonverbal communication. So – and as I turn away from him to take a drink from my coffee, he's coming through the door saying something, and he was waving his arms.

So I get up from my table. He was coming at me, looking at me, waving his arms and making a statement. I get up from my table.

Q How –

A He comes directly in front of me and stand about a foot apart face to face. And he says: What's up? I didn't say nothing, didn't make no response or nothing to him.

Q Now, you mentioned that you got up from the table. How far way was Mark Close when you got up from the table?

[13] A He entered the doorway where that gold chair is right there –

Q Okay. So –

A – is where I was when I – I was fully standing up and took one step. Me and him were far away from that corner of the table right there.

Q Okay. So from your chair, the doorway was about five or six feet or so? That's where he came in?

A No. Corner of the table ain't nothing but about – well, you said feet, yes, five, six feet.

Q Okay. Okay. And so – just let me get this straight – so when he came to the door, that's when you got up?

A I stood up when I seen him coming through the doorway waiving [sic] his arms. He was inside of the door, because – you know, he was inside of the doorway, but I wasn't looking in his direction. Like I said, I turned from him and started drinking my coffee. I noticed him coming through the doorway saying something inside the door or coming towards me, so I stood up.

Q Now, you say coming towards you. Was he still coming in the room, or coming right –

A He was coming towards me.

Q Okay. Was there any other –

[14] A Pointing and waiving [sic] his arms in my direction making comments towards me.

Q Were there any other people sitting with you?

A Yes.

Q Okay. How many other people were sitting with you?

A Three.

Q And who were those people?

A Jones-El, Screws, and Walker.

Q Did you hear what Officer Close was saying?

A I really – at the time, I was – I really – I was shocked by the way he was coming at me. But like I said, I was alarmed by the way he was coming at me, and I stood up to defend myself. I didn't pay attention to what he was saying. It was his body language to what I was paying attention to.

Q So you – I just want to get this straight –you – he was saying something, but you don't know what that is?

A No.

Q And you say he was waiving [sic] his arms around. Would you describe a little more what you mean by that.

A When he came through the door, he was making motions with his arms. When he came through the door, he was making motions like this here. He was saying something. I don't know, just waving or something [15] his arms.

Q So like the kind of gesturing people do when they talk?

A Yes.

Q Okay. Now, your lawsuit involves a major misconduct. When did that happen?

A Same date.

Q So is this something where he immediately issued the major misconduct?

A Just this incident.

Q And I guess what I'm trying to say is, when was it that you found out that the major misconduct – I mean, is it an immediate thing or a couple of hours later or, you know, when is it that you actually get the ticket?

A I was taken from the chow hall at the time of the incident that we just spoke about. I was taken to a detention unit.

Q Who took you?

A I was taken by Officer Matevia and Sergeant Tipton. When I was placed in Unit 2, I stayed in Unit 2 holding cell until nearly a little past 11:00 before I was notified that a ticket was actually going to be written. And then a ticket was reviewed with me sometime after noon.

[16] Q Now, you said that Officers Tipton and Matevia were the ones that took you away?

A Yes.

Q Okay. Now, could you explain how that happened. And what I'm getting at is, did they just go up and grab you, or did Officer Close tell them to go get you? I mean, how was it that –

A Me and Officer Closer [sic] were standing face to face. Officer Close said: What's up? I didn't respond to what he said.

Officer Matevia then was first in the door, and Sergeant Tipton was following him. Sergeant Tipton said: Go to you cell – no, he didn't say go to your cell. He said: Lock up. Okay? Which means: Go to your cell.

So I started to go lock up. Instead, Matevia said: Put on the cuffs. I looked at Tipton. So I turned around and put on the cuffs. He didn't say nothing. I turned around and put on the cuffs, and they took me.

Q Now, when you're talking, how far away were you from Officer Close?

A Within the radius of a yard. We were all within the radius of a yard of each other.

Q So you're explaining that this was a – basically, [17] like a nose-to-nose kind of situation with Officer Close?

A Some way we were inches apart. Some say we was a foot apart. And some say actual statement about how close we are, he said that – check in the ticket. It claims that – alleges that I was breathing on his face.

Q Now, how far away do you say you were?

A I would say we were at least a foot apart.

Q Now, you mentioned that you were eating with Jones-El, Screws and Walker. Who else was in the room at the time?

A A lot of other prisoners. A lot of them.

Q Like –

A I can't recall all of their names.

Q Sure, But what –

A I know one of them was Zebadiah Holland. Do you know how to spell that? Z-E-B-A-D-I-A-H, H-O-L-L-A-N-D.

Q So we have the three officers, the four other inmates that you know their names and approximately how many other inmates do you think were in there? I mean, are we –

A Ten.

Q About ten?

[18] A Yes.

Q Now, also in your complaint you mentioned something about Officer Close's face all contorted. What do you mean by that?

A His face was angry. His face was all messed up. He was – his face was all broke up. He was staring at me all – like he was going to do something, red in the face.

Q Now, from when the officer and you looked at each other through the window and until you got taken away, about how long was that?

A Say that –

Q Basically, that the whole incident, about how long did it take?

A I can't tell – I can't say for sure. Are you talking from the time we came up from breakfast – I would say that was 7:00 – maybe 7:30 we came into the chow hall. All right. So maybe I sat at the table five, six minutes before this incident occurred, and I was taken to the hall.

Q Okay. So –

A Maybe a little longer.

Q So after you noticed what you described as Officer close staring at you, how long after that until he came in?

[19] A What?

Q Because you had said earlier that Officer Close was staring at you through the window; correct?

A Right.

Q Now, after you noticed that, about how long until Officer close walked in?

A I noticed it from the time that I sat down at the table.

Q Oh, so it's right away.

A The whole period of time that I was in there, it's the whole period that he was doing it.

Q So the officers are already there before you even get to breakfast?

A Right.

Q Now, prior to that incident, how long did you know Officer Close?

A I didn't – I knew of him since 1994.

Q And in your lawsuit here you're claiming that these actions were in retaliation for prior lawsuits and grievances; is that correct?

A Yes.

Q Let's start with the lawsuits. Would you explain what these are about and how they related to Mr. Close.

A In 1990 – all of the lawsuits Close involved [20] hisself [sic] in situations between me and other individuals. And because of my litigation with officers other than Close, Close call himself aiding them, harassed, retaliated, did all kinds of things, even threatened me, as one of the grievances I submitted has on it, with physical violence. So it's just been – it has just been a constant problem between me and him from 1994, from the time he chose to involve hisself with my litigation with other officers.

Q Okay. So I just want to get this straight. In your complaint you talked about two separate lawsuits; correct?

A Yes.

Q And in both of these lawsuits, they involve other officers but not Officer Close?

A No. Both of them lawsuits Close is named as defendant and they –

Q And other officers?

A With other officers.

Q Okay.

A Et al.

Q Has Officer Close ever struck you?

A No.

Q Has Officer Close ever physically harmed you in any [21] way?

A No.

Q Now, in your complaint and amended complaint you talk about a physical injury. Would you explain what you mean by that.

A Physical injury to the extent that we're talking about in the first amended retaliation claim, we're talking about the time that he placed me in detention, punitive detention unlawfully in retaliation for no reason, false, total lie, had me placed in a detention-type setting, understand, which is my physical person, right, for a period of six days leading up to a hearing.

Q Okay. So that's what you're referring to a physical injury, not actually –

A Right.

Q – not actually you got cut or anything like that?

A No.

Q Okay. Now, I'm just going to read a paragraph from your amended complaint where you state: Plaintiff requests $10,000 in compensatory and punitive damages for the physical and emotional injuries sustained as the result of Defendant's retaliatory conduct.

And I just want to ask that – this [22] is the compensation you're asking for?

A Yes.

Q Okay. So this is an accurate representation of what you're asking the court to give you?

A At this time, yes.

Q Is there anything else, or is this it?

A I'm not an attorney.

Q Sure.

A I did that – I did that on my own.

Q Okay.

A And I'm not an attorney, and I think that maybe I need to review in and out on that particular topic a little bit with my attorney. However, I do believe that $10,000, as far as monetary relief, is concerned is –

Q I guess what I'm asking, though, is that the monetary relief is all you're asking for? As far as you're not asking for transfers or –

A Then, again, I agree with Judge Cleveland, that there is other possible declaratory and injunction – different types of reliefs available. If my attorney and I talk about it, might decide to pursue. I don't know.

Q But that wasn't in your amended complaint?

A What?

[23] Q But that was not in your amended complaint?

A Yes, I did that pro se.

Q Okay. Now, other than the misconduct that gave rise to this lawsuit, have you had other misconducts?

A Absolutely.

MR. HIMEBAUGH: And, Court Reporter, would you mark this as Deposition Exhibit 2.

(Muhammad Deposition Exhibit No. 2 was marked for identification by the Court Reporter.)

BY MR. HIMEBAUGH:

Q I'm going to just go through this briefly just to confirm that my information is correct. As you know, this summary is from March 24, 1991, through August 5, 1999.

Now, is it true that the abbreviation 012 stands for threatening behavior?

A (Nodding head affirmatively.)

Q Okay. Is that a yes?

A Yes. Yes.

Q Okay. Now, according to the summary, you had 19 of these misconducts. According to your information, is that the correct statement?

A (Nodding head affirmatively.)

Q That's yes?

[24] A Yes.

Q Now, is it true that the abbreviation 020 stands for disobeying a direct order?

A Yes.

Q Okay. According to the summary, you had 30 of these misconducts. Is this true, to the best of you knowledge?

A I'm not going to continue answering. I ain't counted them. I don't know. Possibly.

Q Okay. And is it true that 026 stands for insolence?

A 026, yes.

Q And according to this summary, it's reported that there is ten of those. Does that sound accurate to you?

A I have no idea.

Q Well, you can have –

A You want me to take time and count all of these up?

Q Well, I just want to make sure my information is correct, if there's no errors in – I mean –

A This –

Q Does ten sound right, I mean, versus zero or versus a hundred?

A This dates back 1991; right? It's possible that I had ten insolence charges against me during that time period.

[25] Q And it's true that the abbreviation 036 stands for out of place?

A I don't even know that one.

Q So you're not familiar?

A I do – yes. I do recall getting an out of place ticket.

Q Now, what does that mean?

A It meant that I went to the chow – I came back from the gym, changed clothes, washed up, changed clothes, ran out of my house to try to get to the chow hall so I could get something to eat and forgot my ID. When they asked me for my ID, I couldn't show them my ID, so a guy wrote me an out of place ticket, because I didn't have my ID. I was five and a half plus a ticket, three, so they

gave me one day of detention and messed up six days – six months ticket free, which would have been three points off of my security. So, yes, I remember that ticket fondly.

Q Now, just one last one I want to get at is the 030. That stands for possession of dangerous contraband. Do you recall that instance?

A 030.

Q One of those.

A I don't know. I don't know I had a ticket for [26] dangerous contraband at one time. That's the reason I was sent to Standish.

Q Okay. And what was the dangerous contraband that was involved with that?

A Allegedly they found some of my paperwork – what do you call it – homemade shank, S-H-A-N-K, a knife.

Q Now, this summary ends at August 5, 1999. Since that time, which is about a year ago, have you had any major misconducts after the last date of this?

A Yes.

Q And what were those?

A 012s, 020s.

Q So those are the threatened behavior and disobeying direct orders?

A Yes.

Q Okay. Now, those – the threatening behavior, major misconducts, about how many have you had within the last year?

A Two, three, I'm guessing.

Q Now, I'm not really familiar with the definition. Is this always something that's directed toward an officer, or can this be towards an inmate also, threatening –

A No, it can all be towards officers. Inmates don't count.

[27] Q Sure.

Now, let's see. Now, when you were charged with the major misconduct of threatening behavior, the one involving Mark Close –

A Yes.

Q – after receiving a ticket, what happens as far as investigation, a hearing, all that, what happens?

A Because I was in general population at the time that this ticket was written, I was placed in what you call temporary segregation, which is the same as punitive detention or the hole, the worst possible place you could be put in any institution. I had to stay in that place until a hearing was had, because I was considered a threat to the institution.

Q And so from the time you went there until – from the time you went into the hole until your hearing, how long was that, how many days?

A I have to see the ticket and stuff. I think it was five days.

Q And would you explain what happens at the hearing.

A The hearing, you go into the hearing. Hearing officer reads the misconduct to you. Any witness statements that – or any information that he has been presented with and pronounces his judgment.

[28] Q And what happened at that hearing?

A At that hearing, Arvid – how do you spell it?

Q I think it's A-R-V-I-D.

A Right.

Q Last name, P-E-R-R-I-N.

A Right.

Q That's correct.

A Right.

Arvid Perrin read the misconduct ticket, made a joke, said that yes, he had smoke coming out his ears and so forth and so on, exaggerating stuff, comments were made, the ticket by the officer, that I had veins bulging out of my neck and all this here. He made a joke in regards to that. And he told me that he didn't find where I made – I didn't say nothing to the officer. He didn't find where I made any threats to the officer, physically or in any kind of way. So he found me guilty of insolence for standing up.

Q And after the hearing was completed, did you appeal that as far as – I think you're allowed to ask for a rehearing; is that correct?

A Yes.

Q Did you ask for your rehearing?

A No.

[29] Q And what was the reason for not?

A Because I have done rehearings and judicial review of major misconducts, maybe ten, twelve tickets. And I'm convinced that that whole system don't work.

Q Okay. So you didn't pursue that? You did not pursue that remedy at this time?

A Not at this time.

Q Now, before we finish here, are there any answers you wish to change that you thought of –

A No.

Q Do you recall anything now that you couldn't think of when I asked the question?

A No.

MR. HIMEBAUGH: That's all I have.

MS. KANAR: Can we take a minute.

MR. HIMEBAUGH: Sure.

MS. KANAR: Okay. Just go off the record for a moment.

(Discussion off record.)

MS. KANAR: I just have one clarification.

EXAMINATION

BY MS. KANAR:

Q When Mr. Himebaugh asked you what was Mr. Close's arm position when he was coming towards you, could [30] you do that gesture again that he was –

A It's hard, because he was walking – if you're walking fast and coming around, he's coming around the corner, and it's like – it's like – like this. and he was making a statement. Both of his arms were moving like this, looking in my direction making a statement.

Q My question, my clarification, I guess, Mr. Himebaugh described your arms as straight out, and they looked bent at the elbow to me.

A No, that was prior.

Q Oh, that was outside?

A He was talking about him standing in the window and making fight stance with his arms like this and palms were like this and his elbows were extended.

When he came through the door, he was more of a – making a gesture in my direction right with his hands, like he was saying something.

Q So when he was outside, his arms really weren't straight out. They were bent at the elbow. And from the elbow down, they were straight out? But the top –

A He was making like a gesture like: What is up?

Q Okay.

A And then when he got in there, that's what he said [31] when we was face to face: What's up? And what's up is commonly used to me: Let's do this, let's fight.

Q Okay. Back to – he was outside. He was making that gesture. But his arms were bent at the elbow, they were not straight out?

A Yes. Like a person go down to rise or whatever, like that.

Q Okay. I'm trying to describe it in words, because we can't put your position in the record. So that's why I'm playing with these words so much, trying to get that accurately.

Was he crouched at all?

A Yes. Crouched like a wrestling position with his hands palms facing up and crouched down and bent at the knees and in a – his palms facing up. His elbow bent and was crouched down like in a wrestling position.

MS. KANAR: Okay. Thank you. That's all I have.

(END OF RECORD)

(Deposition concluded at 11:00 a.m.)

[32] STATE OF MICHIGAN)
) ss:
COUNTY OF INGHAM)

I, Lynne K. Haf, Shorthand Reporter and Notary Public in and for the above county and state, acting in the County of Ionia, do hereby certify that the aforegoing

deposition was taken before me at the time and place hereinbefore set forth.

I further certify that said witness was by me sworn in said cause and the testimony then given was reported by me stenographically and subsequently transcribed and that the aforegoing is a full, true and correct transcript of my original shorthand notes.

IN TESTIMONY WHEREOF, I have set my hand and notarial seal at Lansing, Ingham County, Michigan, this 19th day of July, 2000.

/s/ Lynne K. Haf
Lynne K. Haf (CSR-4545)
Notary Public in and for the
County of Ingham, acting in the
County of Ionia, State of Michigan.
My commission expires: 8/23/02

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SHAKUR MUHAMMAD, (#213302), a/k/a JOHN MEASE,

Plaintiff,

vs.

MARK CLOSE,

Defendant.
_____/

FILE NO. 98 cv 10153 BC
HON. VICTORIA A. ROBERTS
MAG. CHARLES BINDER

DEPOSITION

of ARVID B. PERRIN, taken before M. Jane Allen, Notary Public and Certified Court Reporter, CSR-2724, **at Standish Maximum Facility, 4713 West M-61, Standish, Michigan, on Wednesday, July 12, 2000.** Witness sworn approximately 3:45 P.M.

* * *

[5] adequately documented the hearing, what happened in the hearing, whether I have dealt with all the evidence that was presented and that I've adequately described the reasons for my decision and the basis for those decisions, the evidence relied upon. There's a lot more things than that.

Q Is the rate of – when you find a ticket to be correct, is that called a conviction?

A The ticket may be correct but not necessarily lead to a conviction, or a guilty finding, and the correctness of the ticket may not result in a guilty finding.

Q How could a ticket be correct and not result in a guilty finding?

A Well, if a ticket is correct in the sense that all the facts are true, well, the facts may be true, but they may not result in the prima facie case. They may not address all the elements. They may not fit the definition of the charge, so that's a case where they would not be guilty because what is said is true, but it doesn't make out a charge for what's recognized by department policy.

Q Do you then change the charge if it's another charge?

A Not generally. Usually, I don't. Sometimes, I suppose if there's enough time, and it would depend on the circumstances. I mean, you have to be faced with the circumstance, first of all. There may not be any other [6] charge. There may not be any charge at all. It's a possibility it could be changed. It would have to be reviewed, sent back. A person would be given at least 24-hours notice of the change of charge, opportunity for investigation.

Q So you are not able to find a prisoner guilty of an offense that is not charged on the ticket, then?

A Yes – well, find them guilty of a lesser included, I could do that, certainly. If it was a lesser included, I would be able to, and if the facts made out a different charge rather than the one that was listed, I could send it back. It depends. The process for sending it back for change or amending it would depend on whether, one, I had actually conducted the hearing yet, started taking testimony. Once

I started taking testimony, then, I would have to basically get the prisoner's either agreement to change it at that point or give him notice that I was going to change it, stop the hearing and go on from there, give him 24-hours notice and so forth.

Q Is insolence a lesser included offense than threatening behavior?

A Yes.

Q Have you reduced threatening behavior to insolence before when you have gotten those charges?

A Yes.

[7] Q Why would you make that reduction, typically?

A Well, I wouldn't make it unless the facts that I found did not fit the threatening behavior. If the facts fit threatening behavior, then, I would be compelled to find the person guilty of that charge, but if it does not, then, I have to look and see if there's a lesser included charge that it does fit.

Q We've seen with the witnesses we've talked to today how subjective threatening behavior can be. The witnesses have told us if they feel threatened, they charge threatening behavior, yet, we have a very definite definition in the policy directives. What is the standard that you use for threatening behavior in finding someone guilty?

A Well, it's subjective in the sense of what their perceptions of threatening behavior are, but you're correct, the definition is specific, and I look to see if there is a specific threat, a physical injury or assault, and if there is not a specific threat of physical injury or assault and that

it's just perception of threat and I agree that those actions that I find have occurred intentionally, are those that would be done intentionally to alarm somebody, then, I would reduce that to insolence.

Q So would it have to be a verbal threat to be threatening

* * *

[19] that I don't believe the staff member's version of it. People often in the heat of things might not see everything the way everybody else does that's around them. Sometimes there are staff witnesses that contradict the report, and sometimes, I just don't – if it's a one-on-one situation, I have to rely upon what I think is the logical scenario of what occurred in that instance, and if the facts that come in tend to show that the staff member was not – their version is not logical, then, I would find him not guilty if the prisoner had a much better explanation of what happened.

MS. KANAR: I think I'm finished.

MR. HIMEBAUGH: Okay. I have some more questions, and I would like to refer to this hearing report, so I would ask the reporter to mark this as Exhibit 1 and attach that. I would just note that it's 10 pages in length.

(Deposition Exhibit No. 1 marked for identification.)

EXAMINATION

BY KEVIN HIMEBAUGH:

Q Have you heard of issues come up where an inmate claims that a ticket was written in retaliation for something, whether it be prior misconduct?

A Yes.

[20] Q Now, if an inmate were to make that claim, would that somehow come out either in your report or during the investigation somewhere if they were claiming it?

A Generally, yes. They should be writing their own statements as to what their defense is, and I try to encourage the prisoners to do that. Some of them for their own tactical reasons refuse to make any statements until they get to the hearing, which causes some problems, but at some point along the way, yes, you would say that, or I would write it in my report, prisoner said staff member is lying and retaliating because he filed a grievance or because of something.

Q And I just want to confirm, even though it eventually may not be defensive, he still may be found guilty, but if he raised that, you would still mention that?

A Yes, right.

Q Now, going to this first page, which is your major misconduct hearing report, I notice in that top paragraph, the third sentence, it talks about statements?

A Statements from all these people and Inmate Screws and the resident, so he did write a statement.

Q Now, the question is at the very beginning where the resident stated that Corrections Officer Close, and so on, does that mean he was there?

A He stated that to me.

* * *

[22] some better than others, but I'm very happy with the investigations that are done here.

Q So if an inmate here had a problem, his voice would be heard?

A They are one of the fairest investigations that I have seen.

Q Now, just based on the facts of this, is this something where a different Hearing Officer could have reached a different decision as you?

A More than likely, it could have been, yes. I'm sure that some Hearing Officers would have felt that this was threatening behavior. There is probably some. I just happened to feel if it went over that line, then, there would be no standard at all. It would be whatever subjectively the officer felt, so that's why I look for a specific.

MR. HIMEBAUGH: I have no other questions.

REEXAMINATION

BY WENDY DAVIS KANAR:

Q Just one question. Returning to the subjective nature of the threatening behavior charges and you have to follow the standard definition. Do you consider it – do you ever get threatening behavior charges where the

officer claims to be threatened by relatively innocuous behavior, in your opinion?

[23] A Has it ever happened?

Q Yes, where you felt the officer was either over sensitive or over charging?

A Probably has. I mean, I have been doing this for 18 years. I'm sure there has been occasions when I thought that what was described in the misconduct – however, I wasn't there at the scene, but what is described in the misconduct, the charge might have resulted from over reaction.

Q Is that proper – let me rephrase that. When you've seen these charges, have you ever looked at it and thought that the officer did something improper in over charging, in your opinion, as threatening behavior when it certainly could not have been threatening behavior, an instance like that?

A That's possible, yes. I know, in fact, that I may have felt that, but I don't think I can remember any here, but in some institutions, it was apparent that, yes, they didn't not only overreact, they did it so they could charge with a non bondable, but it was very rare. But it was certain circumstances when I felt that that was the reason they had charged the threatening behavior was to have the non bondable charge.

Q I just want to make one other distinction. I believe you said earlier that if a prisoner's defense is he started [24] it, referring to the officer, that isn't usually a defense; is that correct?

A Yeah, depending on what he started. If he started fighting with him, that wouldn't be a defense, although I can't remember ever having that. But if he started verbally, the prisoner is expected to sticks and stones, and I don't see that he can escalate, or anything like this, or even retaliate and still not violate the rules.

Q Now, is that distinct at all from the situation where the prisoner claims not that he started the incident, but the ticket was written in retaliation, is that the defense if he's claiming the ticket was written in retaliation?

A No, that would go to credibility, I guess, because the officials have discretion on non bondables, whether to write a ticket or not, so they might very well say in retaliation and say "Ordinarily, I would overlook this, but since you did such and such," this may be a thought process, "Since you were not very nice to me yesterday in the chow hall, I'm going to go ahead and write the ticket this time." In a sense, maybe that could be termed and there's progressive discipline retaliation, but if retaliation was raised as a defense saying the prisoner simply lied on the ticket, it would just go to credibility.

MS. KANAR: I have nothing further. I think [25] we're finished, then.

MR. HIMEBAUGH: Thanks.

(Deposition concluded at 4:25 P.M.)

(END OF RECORD)

No. 02-1043

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHAKUR MUHAMMAD, also known as John E. Mease, Plaintiff-Appellant,	)	
v.	)	ORDER
MARK CLOSE, Correctional Officer, Defendant-Appellee	)	

NOT RECOMMENDED FULL-TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situation Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be *prominently* displayed if this decision is reproduced.

Before: MARTIN, Chief Judge, MOORE, Circuit Judge; WISEMAN, District Judge.*

Shakur Muhammad appeals a district court grant of summary judgment for defendant in this civil rights action filed under 42 U.S.C. § 1983. This case has been referred

* The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Muhammad filed his complaint in the district court alleging that the defendant corrections officer falsely charged him with major misconduct threatening behavior in retaliation for prior lawsuits and grievances plaintiff filed against defendant. Plaintiff named defendant in his individual and official capacities and sought compensatory and punitive damages and expungement of the resulting misconduct conviction on a reduced charge of insolence. Defendant moved to dismiss the complaint or for summary judgment, and plaintiff responded in opposition and moved for leave to amend his complaint. The magistrate judge recommended that defendant's motion to dismiss or for summary judgment be denied and that plaintiffs motion to amend his complaint be granted, and defendant filed objections. The district court adopted the magistrate judge's recommendation and denied defendant's motion, and plaintiff filed an amended complaint.

Thereafter, the magistrate judge appointed counsel to represent plaintiff, and defendant moved to dismiss the complaint for failure to exhaust administrative remedies. The magistrate judge recommended that the motion to dismiss be denied, and defendant filed objections. The district court adopted the magistrate judge's recommendation and denied defendant's motion to dismiss.

Following discovery, defendant again moved the district court for summary judgment, plaintiff responded in opposition, and defendant submitted a reply. The magistrate judge recommended that summary judgment

for defendant be granted, and the district court granted plaintiff leave to file pro se objections after counsel declined to do so. The district court adopted the magistrate judge's recommendation and granted summary judgment for defendant. Plaintiff filed a timely notice of appeal pro se. On appeal, plaintiff contends that he established a genuine issue of material fact remaining for trial with respect to whether defendant retaliated against him in violation of the First Amendment. Defendant responds that the district court's judgment was proper.

Upon de novo review, *see Brooks v. Am. Broad. Cos.*, 932 F.2d 495, 500 (6th Cir. 1991), we affirm the judgment of the district court. The, plaintiff seeks punitive and compensatory damages and requests that "the misconduct charge [be] expunged from his file." J.A. at 14. Thus this case falls directly within the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), which this circuit applied to a prisoner seeking damages and expungement of a disciplinary infraction in *Huey v. Stine*, 230 F.3d 226, 228 (6th Cir. 2000). "In order to grant the plaintiff in this case the relief he seeks, we would have to unwind the judgment of the state agency." *Id.* at 230. Thus *Heck* bars the plaintiff's action under 42 U.S.C. § 1983.

Accordingly, the district court's judgment is affirmed. *See* Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE
COURT

_____

Clerk

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

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June 9, 2003

Corinne Beckwith
Public Defenders Service
633 Indiana Ave., NW
Washington, D.C. 20004

Re: *02-9065 – Muhammad v. Close*

Dear Ms. Beckwith:

The Court today entered the following order in the above case:

The motion of petitioner for leave to proceed in forma pauperis is granted, and the petition for a writ of certiorari is granted limited to the following Questions: 1. Whether a plaintiff who whishes [sic] to bring a Sec. 1983 suit challenging only the conditions, rather than the fact or duration, of his confinement, must satisfy the favorable termination requirement of *Heck v. Humphrey.* 2. Whether a prison inmate who has been, but is no longer, in administrative segregation may bring a Sec. 1983 suit challenging the conditions of his confinement (i.e. his prior placement in administrative segregation) without first satisfying the favorable termination requirement of *Heck v. Humphrey.* Corinne Beckwith, Esq., of Washington, D.C. is appointed

to serve as counsel for the petitioner in this case."

* * *

Sincerely,

WILLIAM K. SUTER, CLERK

/s/ Denise J. McNerney
Denise J. McNerney
Merits Cases Clerk

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(1681)

Supreme Court, U.S.
FILED

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No. 02-9065

In The
Supreme Court of the United States

SHAKUR MUHAMMAD, aka John E. Mease,

Petitioner,

v.

MARK CLOSE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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57 pp

QUESTIONS PRESENTED

I. Whether a plaintiff who wishes to bring a § 1983 suit challenging only the conditions, rather than the fact or duration, of his confinement must satisfy the favorable termination requirement of *Heck v. Humphrey.*

II. Whether a prison inmate who has been, but is no longer, in administrative segregation may bring a § 1983 suit challenging the conditions of his confinement (i.e., his prior placement in administrative segregation) without first satisfying the favorable termination requirement of *Heck v. Humphrey.*

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OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit affirming the district court's grant of summary judgment is unreported and is reprinted at JA 104. The United States District Court's Opinion and Order Adopting Report and Recommendation and Granting Defendant's Motion for Summary Judgment is unreported, and appears in the appendix to Respondent's Brief in Opposition at 65a.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit was issued on September 23, 2002. The United States Court of Appeals issued an order denying Petitioner's petition for rehearing on November 14, 2002. Petitioner filed a petition for writ of certiorari on February 11, 2003, within 90 days of the entry of judgment, and this Court granted the writ of certiorari on June 16, 2003. Petitioner invokes the jurisdiction of the Supreme Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 2254 states, in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT OF THE CASE

This § 1983 action stems from an incident at Standish Maximum Facility in Standish, Michigan, where Petitioner Shakur Muhammad was an inmate. Petitioner's claim alleges that Respondent Mark Close, a guard at that facility, instigated a confrontation with Petitioner and then filed a false major misconduct report charging Petitioner with a more serious major rule violation than he committed – all in retaliation for Petitioner's having exercised his First Amendment rights by filing previous lawsuits and grievances against Respondent.[1]

[1] *See Crawford-El v. Britton*, 523 U.S. 574 (1998) (such retaliation offends the Constitution because it "threatens to inhibit exercise of the protected right") (citing *Pickering v. Board of Education*, 391 U.S. 563,

(Continued on following page)

Petitioner contends that on May 21, 1997, he was eating breakfast in the dining area when he noticed Respondent staring at him from an adjacent hallway. JA 71. Respondent then made a fighting stance toward Petitioner, and when Petitioner turned away, Respondent walked quickly toward him with his face contorted. JA 71. Petitioner stood up from the table. JA 71. Respondent stated "What's up?" and continued to stare at Petitioner, and at that point two other officers quickly handcuffed Petitioner and took him to a detention cell. JA 71.

Later that day, Respondent filed a major misconduct report charging Petitioner with "threatening behavior," a "nonbondable" charge that requires prehearing detention.[2] JA 5. Petitioner remained in detention for six days pending a major misconduct hearing on May 27, 1997. On that date, after reviewing the statements that were submitted by Petitioner, Respondent, and various other officers and inmates who witnessed the incident, the hearing officer acquitted Petitioner of threatening behavior and found him guilty of the lesser offense of "insolence" for "[getting] up from his seat in an alarming manner and [standing] face to face with the officer." JA 58. Like threatening behavior, insolence is also a major rule violation under the

574 (1968)); *Brown v. Crowley*, 312 F.3d 782 (6th Cir. 2002) (retaliation against a prisoner based upon his exercise of a constitutional right violates the Constitution).

[2] The Michigan Department of Corrections Policy Directive defines "threatening behavior" as "[w]ords, actions or other behavior which expresses a[n] intent to injure or physically abuse another person. Such misconduct includes attempted assault and battery." JA 40. Common examples of "threatening behavior" include "[t]hreats of sexual assault made by one prisoner to another prisoner; writing threatening letters to another person; threats made to a third person which are intended to place the person threatened in fear of harm." *Id.*

correctional department's Policy Directive, but unlike threatening behavior, it is "bondable" and does not require prehearing detention.[3] The hearing officer ordered disciplinary sanctions of seven days in detention and thirty days' loss of all privileges for the violation. JA 58. Among the privileges Petitioner lost were use of a telephone, radio or tape player; access to the yard, the television, study, and game rooms, the library, exercise facilities, and the prison store; and the ability to have visitors or participate in leisure or special activities. JA 60-61. Petitioner's guilt of the charge of insolence included no findings regarding the merit of his claim of unconstitutional retaliation by a state official as such facts, even if true, were no defense to insolence. JA 58. Any future victory in Petitioner's § 1983 claim would therefore not directly or indirectly undermine the adjudication for insolence.

Petitioner served his term of detention – six days prior to the hearing and seven days after the hearing – and subsequently filed a complaint against Respondent under 42 U.S.C. § 1983 alleging injuries as a result of Respondent's threatening conduct and his retaliatory use of the prison disciplinary process. JA 62-69. Petitioner's original complaint demanded $4,300 in compensatory damages, $5,000 in punitive damages, and expungement of the misconduct charge. JA 68-69. Respondent promptly moved for dismissal of the complaint or for summary judgment on the grounds that (a) this Court's decision in *Edwards v. Balisok,* 520 U.S. 641 (1997), barred Petitioner's § 1983 claim; (b) the hearing officer's finding of guilt on the

[3] "Insolence" is defined as "[w]ords, actions, or other behavior which is intended to harass, or cause alarm in an employee." JA 44. Examples include "[a]busive language, writing or gesture directed at an employee." *Id.*

charge of insolence defeated Petitioner's claim that the charge was retaliatory; and (c) Respondent was entitled to qualified immunity. *Edwards v. Balisok*, which applied the favorable termination rule of *Heck v. Humphrey*, 512 U.S. 477 (1994) to disciplinary proceedings resulting in the loss of good-time credits, held that regardless of the remedy actually sought, a prisoner must first obtain a favorable judgment in state court or in federal habeas before he can obtain damages in a § 1983 action that necessarily implied the invalidity of the deprivation of good-time credits. *Id.* at 646. Respondent did not contend that Petitioner was deprived of good-time credits, but instead argued – consistent with Sixth Circuit precedent but contrary to the precedent of almost every other federal circuit court – that *Edwards* barred a § 1983 action that implied the invalidity of *any* punishment that was imposed at a disciplinary hearing. Record 9 at 3.

Magistrate Judge Charles E. Binder issued a Report and Recommendation rejecting each of these grounds and recommending denial of Respondent's request for dismissal and summary judgment. With respect to Respondent's *Edwards v. Balisok* argument, Magistrate Judge Binder indicated that the relevant injuries were not the seven days of detention and 30 days' lost privileges imposed as sanctions for Petitioner's guilt of insolence, but the six days of mandatory prehearing detention and Respondent's instigation of the incident that led to that detention. Brief in Opposition 27a. In the judge's view, *Edwards* did not preclude Petitioner's § 1983 suit because Petitioner had already served the relevant detention and was therefore not "in custody" within the meaning of the habeas corpus statute, 28 U.S.C. § 2254, and could not bring a habeas action "with respect to the alleged provocation of the incident and the wrongful pre-hearing detention." *Id.* There was no reason to require Petitioner to favorably terminate his claim, Magistrate Judge Binder

stated, because "there is no concern that a § 1983 action could be used as an end run on the habeas exhaustion requirement" in a case "where there has been no deprivation of good-time credits and the inmate has served whatever period of time in segregation or toplock that was imposed by the hearing officer." *Id.* Even if the unavailability of habeas did not by itself establish Petitioner's right to pursue his § 1983 claim, the magistrate judge reasoned, Petitioner's § 1983 suit still was not precluded by *Edwards*: Petitioner was not disputing his guilt of the insolence charge, only Respondent's instigation of the incident in an effort to frame Petitioner and his issuance of a misconduct ticket for a more severe charge than was necessary. Therefore, a favorable outcome would not imply the invalidity of the disciplinary hearing officer's finding. *Id.*

Respondent filed objections to the Report and Recommendation but did not contest Magistrate Judge Binder's rejection of Respondent's request to dismiss Petitioner's suit under *Edwards v. Balisok*. Record 18. District Judge Robert Cleland issued an order adopting the report in all respects and ruling that the witness statements describing Respondent's behavior could "easily be interpreted as a gesture soliciting a fight." Brief in Opposition 41a.

Judge Cleland also adopted the magistrate judge's recommendation to grant Petitioner's request to amend his § 1983 claim. The amended complaint continued to allege that Respondent engaged in threatening conduct and falsely charged Petitioner with a major misconduct charge in retaliation for Petitioner's having filed two lawsuits and several grievances against Respondent. JA 71-72. The new complaint eliminated the request for expungement of the misconduct charge and requested $10,000 in compensatory and punitive damages "for the physical, mental and emotional injuries sustained as a result of defendant's retaliatory acts." *Id.*

Petitioner litigated much of his § 1983 suit *pro se*, as the magistrate judge denied a motion for appointment of counsel at the outset of this litigation. When Petitioner moved for reconsideration of that ruling after Judge Cleland denied Respondent's request for dismissal or summary judgment, the magistrate judge granted the request and appointed *pro bono* counsel to represent Petitioner. Following discovery, which included numerous depositions of officers and inmates who had witnessed the incident, Respondent again filed a motion for summary judgment.[4] This time, Magistrate Judge Binder recommended that the district judge grant summary judgment on the grounds that Petitioner had failed to come forth with evidence permitting a reasonable jury to conclude that Respondent had retaliated against Petitioner. Brief in Opposition 65a.

When Petitioner's *pro bono* counsel declined to file objections to this unfavorable ruling in the Report and Recommendation, U.S. District Judge David M. Lawson, to whom the case had been transferred, permitted Petitioner to file objections *pro se*, *see* Record 84, but subsequently adopted that Report and granted summary judgment to the Respondent, finding that although Petitioner properly pleaded all the elements of his retaliation claim, he failed to provide sufficient factual support for the element of causation. Record 86 at 4-5.

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[4] Both Magistrate Judge Binder and U.S. District Judge David Lawson, to whom the case had been transferred, rejected Respondent's arguments in a separate motion to dismiss that Petitioner had failed to exhaust his administrative remedies and had failed to allege a physical injury as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) & (e). Record 62, 71, and 68 at 8-11.

Petitioner, still proceeding *pro se*, filed a timely appeal to the Sixth Circuit. Sixth Circuit Record 2; Record 88. Respondent filed a brief supporting the district judge's ruling and arguing, alternatively, that Petitioner's case should have been dismissed under the recent decision in *Huey v. Stine*, 230 F.3d 226, 230-231 (6th Cir. 2000), which held that a prisoner's § 1983 action alleging that prison officials wrongly disciplined him in violation of the Eighth Amendment was barred by the favorable termination requirement of *Heck v. Humphrey* and that the unavailability of habeas corpus did not entitle the prisoner to revive the § 1983 claim. Sixth Circuit Record 3.

In an unpublished opinion decided without oral argument, the Sixth Circuit ignored the basis of the district court's decision and affirmed the grant of summary judgment based on its decision in *Huey v. Stine*. JA 106. Without noting that Petitioner's amended complaint omitted the request to expunge the misconduct charge from his file, the court of appeals held that because Petitioner sought punitive and compensatory damages *and* requested the expungement of his misconduct charge, the case was governed by *Heck v. Humphrey*, "which [the Sixth Circuit] applied to a prisoner seeking damages and expungement of a disciplinary infraction in *Huey v. Stine*" and which precluded a § 1983 claim where the relief sought would require the court "to unwind the judgment of the state agency." JA 106. The Sixth Circuit denied Petitioner's request for rehearing.

SUMMARY OF THE ARGUMENT

A constitutional challenge to the conditions affecting prison life is a quintessential cause of action under 42 U.S.C. § 1983. Prison guards and officials who control nearly every facet of inmates' lives, and who at times

violate the constitutional rights of those inmates, epitomize the type of defendant contemplated by both the plain terms and the history of § 1983, which creates liability for acts committed "under color of any [state] statute, ordinance, regulation, custom or usage." This Court's decisions have long recognized that § 1983 is the appropriate vehicle for challenging the constitutionality of the conditions of an inmate's confinement. *See, e.g., Hope v. Pelzer,* 536 U.S. 730 (2002) (§ 1983 claim against prison guards who handcuffed an inmate to a hitching post as punishment for disruptive conduct); *Wilwording v. Swenson,* 404 U.S. 249 (1971) (prisoners' challenge to living conditions and disciplinary measures could be read to plead causes of action for deprivation of constitutional rights by prison officials under § 1983). Petitioner's challenge to the retaliatory acts of a prison guard falls squarely within the range of conventional § 1983 claims.

This Court has identified limits to § 1983's broad substantive scope in circumstances where a winning § 1983 damages action would eclipse the more specific terms of another congressional enactment – the federal habeas corpus statute. 28 U.S.C. § 2254. In *Preiser v. Rodriguez,* 411 U.S. 475 (1973), this Court established an easily administrable, bright-line rule for effectuating Congress's intent in the habeas corpus exhaustion requirement: cases that implicate the heart of habeas corpus by challenging the fact or duration of an inmate's custody must be brought as habeas claims, while cases challenging only the conditions of an inmate's confinement can proceed under § 1983. *Id.* at 489.

In *Heck v. Humphrey,* 512 U.S. 477 (1994), this Court reaffirmed *Preiser*'s dichotomy between fact-or-duration cases and conditions cases and identified a "favorable termination requirement" in the doctrine, holding that in cases in which the prisoner's lawsuit, if successful, would demonstrate the invalidity of the criminal judgment under

which the plaintiff was imprisoned, a § 1983 claim could not go forward unless the prisoner first proved that the conviction or sentence in question had already been reversed on appeal or otherwise deemed invalid by an executive order, an act of a state tribunal, or a federal court's issuance of a writ of habeas corpus. *Id.* at 486-487. Like its predecessor in *Preiser,* this rule stems from a need to prevent § 1983 from swallowing the more specific federal habeas corpus statute in actions that attack the legality of a prisoner's custody with the goal of securing immediate or speedier release.

This rationale does not extend to § 1983 claims that challenge only the conditions of a prisoner's confinement. While *Preiser v. Rodriguez* made clear that § 2254 was the sole federal remedy for a state prisoner challenging the fact or length of his imprisonment because such claims fell within the traditional purpose – the "core" – of habeas corpus, § 1983 remained the "proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." 411 U.S. at 492, 494, 499. The interest in implementing Congress's explicit intent to require exhaustion of state remedies in habeas corpus cases underlies the *Preiser* Court's ruling that the more general Civil Rights Act is not the right remedy for challenges to the fact or length of a prisoner's confinement. That interest is irrelevant, however, to constitutional claims that fall outside the traditional purpose of federal habeas corpus.

Decisions after *Preiser* expanded upon this principle in circumstances involving procedural challenges to the way state prison officials deprived inmates of good-time credits, *see Wolff v. McDonnell,* 418 U.S. 539 (1974), damages claims that did not explicitly seek but would nonetheless bring about the invalidation of a criminal conviction, *see Heck v. Humphrey,* and challenges to allegedly biased prison disciplinary proceedings that

resulted in the loss of good-time credits, *see Edwards v. Balisok,* 520 U.S. 641 (1997). But this Court's evolving jurisprudence on the interplay between § 1983 and federal habeas has never disavowed *Preiser's* fundamental distinction between cases challenging the conditions of confinement and cases challenging its very fact or duration. Any extension of the *Preiser-Heck* rule to cases not affecting the fact or duration of confinement would be unsupported by logic or history and tantamount to an unwieldy judicial amendment of the Civil Rights Act.

Congress further reinforced the inapplicability of the favorable termination requirement to cases challenging prison conditions when it enacted the Prison Litigation Reform Act (PLRA) and specifically required prisoners to exhaust all available administrative remedies before bringing a § 1983 claim with respect to prison conditions.[5] The PLRA makes clear that Congress does not intend a favorable termination requirement to apply to § 1983 actions challenging prison conditions. Such a requirement would clash with the regime Congress *did* create, which is that the prisoner must *exhaust,* not win a favorable judgment from, the available administrative, not judicial, remedies.

The federal appellate courts have been virtually uniform in maintaining this Court's clear distinction between core habeas claims affecting the fact or duration of custody and claims involving the way inmates are treated in prison. The only courts that deviate from the bright-line rule of *Preiser* – the Sixth Circuit in *Huey v.*

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[5] Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321-66 (1996). The exhaustion provision appears in PLRA § 803(d) (amending Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7, 94 Stat. 349-55 (1980), and codified as amended at 42 U.S.C. § 1997e(a)).

Stine, 230 F.3d 226, and the Tenth Circuit in several unpublished decisions – misread *Edwards v. Balisok* to bar § 1983 claims that challenge the punishment imposed in prison disciplinary hearings, whether or not that punishment affected the length of a sentence as the deprivation of good-time credits did in *Edwards.* Application of the favorable termination principle to cases involving prison disciplinary hearings that do not attack the fact or duration of confinement flatly violates the conceptual underpinnings of *Preiser* and its progeny and sacrifices the analytical clarity of *Preiser's* bright-line rule.

Such an approach also lacks any independent justification in the broad terms and purpose of § 1983. Congress's unequivocal intent in § 1983 to place the federal courts between the states and their citizens "as guardians of the people's federal rights," *Mitchum v. Foster,* 407 U.S. 225, 242 (1972), easily outweighs the misplaced comity considerations that caused the Sixth Circuit's angst about "unwind[ing] the judgment of the state agency." JA 106. Moreover, general application of the favorable termination rule to disciplinary proceedings would have the curious result of precluding many classic civil rights plaintiffs – for example, an inmate who was placed in segregation by a hearing officer solely because of his race – from getting into federal court under a statute that was born of a fundamental distrust of state courts' willingness and ability to enforce such rights. Even if federal habeas is theoretically available for such claims – and this Court has never definitively held that it is – it is not a realistic option for challenging what are typically brief stints in detention. That contrasts sharply with core habeas cases, where favorable termination includes a federal habeas forum.

Even if a plaintiff bringing a § 1983 suit challenging only the conditions of his confinement *were* required to

first obtain a favorable judgment in federal habeas, plaintiffs like Petitioner – who are no longer subject to those conditions and are therefore prohibited from pursuing relief in habeas – must have a remedy in § 1983. Justice Souter's words in cases involving challenges to the fact or duration of confinement are just as applicable to cases challenging the conditions of confinement: the "better view," according to Justice Souter and the four Justices agreeing with him, "is that a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Spencer v. Kemna,* 523 U.S. 1, 21 (1998) (Souter, J., concurring).

Though Petitioner remains incarcerated, he is no longer subject to Respondent's retaliatory conduct and is no longer serving either the mandatory prehearing detention or the detention imposed at the misconduct hearing. The § 1983 claim of a prisoner such as Petitioner should be presumptively cognizable unless the remedy it seeks causes a collision at the intersection of federal habeas and § 1983. Petitioner's § 1983 action does not clash with federal habeas corpus because it has no prospect of invalidating his underlying conviction or the duration of his sentence and because the term of segregation was too brief to permit litigation of any habeas claim he might have had. The history and purpose of § 1983, which provides a remedy for deprivations of "any" constitutional rights by "[e]very" person acting under color of state law, admit no basis for extending the favorable termination requirement, and effectively eliminating the prospect of a § 1983 claim, to an inmate whose claim cannot be remedied by the federal habeas statute.

ARGUMENT

I. A SECTION 1983 SUIT CHALLENGING THE CONDITIONS OF A PRISONER'S CONFINEMENT IS NOT SUBJECT TO THE FAVORABLE TERMINATION RULE OF *HECK V. HUMPHREY*

Section 1983 is an expansive statute designed to enforce the protections of the Fourteenth Amendment against the unlawful actions of those acting under color of state law. A product of the post-Civil War era when the Ku Klux Klan was brazenly flouting the law and when state officials and state courts in the South often would not or could not protect the civil liberties of all citizens, § 1983 "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster,* 407 U.S. at 239.

The § 1983 remedy has been broadly available to prisoners without regard to the existence or use of state remedies, with two significant exceptions. First, as a matter of statutory interpretation harmonizing the more specific requirements of federal habeas and § 1983's broad language – language that if literally applied would swallow virtually all habeas cases – this Court held in *Preiser v. Rodriguez* that heartland habeas cases that challenge the fact or duration of confinement must be brought under the habeas statute and may not be brought as § 1983 cases. In what must be read as an extension of *Preiser*'s rationale, *Heck v. Humphrey* required favorable termination of a criminal conviction through normal channels – that is, state court proceedings and federal habeas – before a litigant could collect money damages for a § 1983 claim that did not directly attack the fact of confinement but still

necessarily implied the invalidity of a state court judgment.

Second, Congress explicitly limited the availability of § 1983 through the PLRA's requirement that a prisoner exhaust "such administrative remedies as are available" before bringing an action with respect to prison conditions under § 1983. 42 U.S.C. § 1997e(a)). Because the favorable termination requirement emerges solely from concerns about preserving the federal habeas corpus structure where Congress intended it to apply, it does not apply here, in a case that involves not the validity of a state court conviction or duration of confinement, but a citizen's right, even behind bars, to civil liberties guaranteed by the Constitution. The PLRA's exhaustion requirement lays to rest any misguided notion that the favorable termination requirement is relevant to the present lawsuit independent of preservation of federal habeas as the proper means of bringing core habeas challenges. The PLRA evinces an unmistakable congressional intent to require exhaustion of state administrative remedies, not victory in state proceedings, as a precondition to a § 1983 suit challenging prison conditions.

A. The History of Section 1983

1. Origins and Evolution

The Civil Rights Act of 1871, 42 U.S.C. § 1983,[6] was enacted in the volatile aftermath of the Civil War to provide a federal remedy for infringements upon civil rights that were not being protected adequately by state

[6] Section 1983 was originally § 1 of the Civil Rights Act of 1871. 17 Stat. 13.

authorities, particularly in the South. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The purpose of § 1983, originally known as the Ku Klux Klan Act, was "to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law. . . . " *Mitchum v. Foster,* 407 U.S. at 242; *see also Monroe v. Pape,* 365 U.S. 167, 180 (1961) (Act was designed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."). During this Reconstruction Era, "the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power." *Patsy v. Board of Regents,* 457 U.S. 496, 503 (1982).

Notwithstanding § 1983's ambitious origins and expansive language, its utility to aggrieved citizens seeking relief for the most commonplace constitutional violations was not realized until after this Court's watershed decision in *Monroe v. Pape,* 365 U.S. 167. *Monroe* clarified that claims of constitutional violation were redressable in federal court under § 1983 whether state law provided a remedy for such conduct or not. *Id.* at 183. Three years later in *Cooper v. Pate,* 378 U.S. 546 (1964) (*per curiam*), this Court explicitly held that a prisoner's claim – like any other citizen's claim – that he was denied certain privileges solely because of his religious beliefs stated a cause of action under § 1983. The Court subsequently recognized that § 1983 provides a cause of action for unconstitutional prison conditions ranging from inadequate medical care, *Estelle v. Gamble,* 429 U.S. 97 (1976), to brutality by prison guards, *Hudson v. McMillian,* 503 U.S. 1 (1992).

This Court has consistently stated that exhaustion of state administrative remedies is not generally a prerequisite to a § 1983 action. *Patsy v. Board of Regents,* 457 U.S. at 501; *Monroe v. Pape,* 365 U.S. at 183. That changed significantly for inmates in 1995, when Congress passed legislation requiring such exhaustion in the context of prisoner challenges to the constitutionality of the conditions of their confinement.[7] The PLRA states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA's exhaustion requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they

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[7] In 1980, prior to the enactment of the PLRA, Congress passed a more limited exhaustion requirement in the Civil Rights of Institutionalized Persons Act (CRIPA), 94 Stat. 352, as amended, 42 U.S.C. § 1997e. The statute gave district courts the discretion to stay an inmate's § 1983 suit to allow exhaustion where it was "appropriate and in the interests of justice" and where the procedures available were determined by the court or by the U.S. Attorney General to be "plain, speedy, and effective administrative remedies." § 1997e(a)(1)&(b). The provision was rarely used. *See* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1627-1628 (2003).

allege excessive force or some other wrong." *Porter v. Nussle,* 534 U.S. 516, 532 (2002).

2. History of the Favorable Termination Requirement

Prior to enactment of the PLRA, this Court recognized another limitation on the broad application of § 1983 in prison litigation – namely, the favorable termination requirement. The requirement that prisoners obtain a reversal or invalidation of the state judgment against them before pursuing certain § 1983 claims first surfaced when courts' expansive treatment of § 1983 actions came into conflict with the strict exhaustion requirements of the federal habeas corpus statute.[8] 28 U.S.C. § 2254.

The favorable termination requirement stems from this Court's decision in *Preiser v. Rodriguez,* 411 U.S. 475 (1973). In *Preiser,* the Court addressed the question whether state prisoners who brought a § 1983 action seeking injunctive relief to compel the restoration of illegally revoked good-time credits could obtain that relief even though the federal habeas statute provided a specific federal remedy for such an injury. The habeas corpus statute provides that a court "shall entertain an

[8] Section 1983 has numerous advantages to prisoners over habeas corpus in most – though not all – circumstances, including the ability to obtain money damages and attorneys fees as well as a trial by jury. *See* 42 U.S.C. § 1988(b). Moreover, since the enactment in 1996 of the Antiterrorism and Effective Death Penalty Act (AEDPA), habeas petitioners must demonstrate that the state court decision they are challenging "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1). *See generally Wiggins v. Smith,* 123 S. Ct. 2527 (2003).

application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254. Such an application shall not be granted, however, "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." *Id.*

In *Preiser*, three inmates alleged under the Civil Rights Act that they were unfairly deprived of good-time credits as a result of unconstitutional disciplinary actions against them by prison officials. 411 U.S. at 478-482. This Court held the cause of action was not cognizable under § 1983. The inmates' request for restoration of good-time credits "fell squarely within [the] traditional scope of habeas corpus" because the inmates alleged that the deprivation of these credits rendered, or would eventually render, their incarceration illegal. 411 U.S. at 487. In the Court's view, "[i]t would wholly frustrate explicit congressional intent" if the respondents in *Preiser* could evade the habeas exhaustion requirement "by the simple expedient of putting a different label on their pleadings." *Id.* at 489-490.

In reaching this conclusion, the Court reviewed the history of habeas corpus as well as the statute's language, noting that a writ of habeas corpus was the established vehicle for securing release from illegal confinement from 16th century England to the time the American colonies gained independence to modern times. *Id.* at 484-486. In the *Preiser* Court's view, the habeas corpus statute was "explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement," and an action represented "the core" or "the

essence" of habeas corpus if it attacked the legality of the plaintiff's custody. *Id.* at 484, 489. Thus, notwithstanding the "literal applicability" of § 1983's terms, habeas corpus must be the exclusive remedy where the prisoner's challenge "is just as close to the core of habeas corpus as an attack on the prisoner's conviction, for it goes directly to the constitutionality of his physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration." *Id.* at 489.

This focus upon actions that cast doubt upon the fact or duration of an inmate's custody was central to the *Preiser* Court's analysis, and the Court was careful to distinguish such claims from those challenging only the conditions of an inmate's confinement. The Court rejected the prisoners' reliance upon several decisions upholding the right to attack allegedly unlawful conditions of confinement, stating that "none of the state prisoners in those cases was challenging the fact or duration of his physical confinement itself," and that "a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." 411 U.S. at 498-499. The Court indicated that a prisoner could bring a damages-only action under § 1983 without having to exhaust state remedies. *Id.* at 494.

In the Term following *Preiser,* this Court in *Wolff v. McDonnell,* 418 U.S. 539 (1974), addressed the question whether a prisoner's challenge to the validity of the procedures for depriving prisoners of good-time credits could be brought under § 1983. Reaffirming *Preiser's* focus upon challenges to the fact or duration of a prisoner's confinement, the Court held that the inmates' request for restoration of good-time credits was foreclosed for the reason a similar request was disallowed in *Preiser:* such an action challenged the very fact or duration of the prisoners' confinement and should be pursued by seeking a

writ of habeas corpus rather than by bringing a § 1983 claim. *Id.* at 554. *Preiser* did not, however, bar the inmates from seeking declaratory relief and damages for the allegedly unconstitutional procedures the prison employed for imposing sanctions such as the loss of good time, *id.* at 554-555 – a request this Court later interpreted as a claim "for using the wrong procedures, not for reaching the wrong result" that would not necessarily have vitiated the denial of good-time credits. *Heck v. Humphrey,* 512 U.S. at 482-483. *Wolff* also noted that in contrast to the loss of good-time credits, "which affects the term of confinement," a challenge to an inmate's detention in a disciplinary cell is an attack upon the conditions of confinement. *Id.* at 547.

After *Wolff,* this Court did not revisit the interplay between habeas and § 1983 until 20 years later in *Heck v. Humphrey. Heck* was a suit for damages under § 1983 that alleged that state prosecutors and police investigators violated Heck's constitutional rights by, *inter alia,* destroying exculpatory evidence and conducting an illegal voice identification procedure. Noting that the Court in *Preiser* had had "no cause to address, and did not carefully consider," the damages question at issue in *Heck* when it indicated that prisoners could bring § 1983 damages actions without exhausting state remedies, the *Heck* Court held that such a statement was true only to the extent that the damages action would in no way demonstrate the invalidity of the prisoner's conviction or sentence. *Id.* at 481-482. Where "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," the Court held, a prisoner's damages claim was not cognizable under § 1983 unless that conviction or sentence had previously been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal

authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."[9] *Id.* at 486-487. The Court modeled this favorable termination requirement upon a similar constraint in malicious prosecution cases – the cause of action the Court viewed as providing "the closest analogy" to the type of § 1983 claim at issue in that case. *Id.* at 484.

Heck v. Humphrey made clear that § 1983 is not available for a lawsuit that casts doubt upon the legality of a conviction, regardless of the remedy sought. *Heck* confirmed the conceptual underpinnings of *Preiser,* characterizing the issue in *Heck* as one involving the collision between § 1983 and the federal habeas corpus statute, *id.* at 480, and devising a test – whether a judgment in favor of the plaintiff would "necessarily imply the invalidity of his conviction or sentence" – that echoes *Preiser*'s focus on whether the § 1983 claim was challenging the fact or duration of the prisoner's confinement. *Id.* at 487; *see also id.* at 483 (viewing the issue as "the same as the issue" in *Preiser). Heck* did not take issue with *Preiser*'s statement that § 1983 was the "proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." *Preiser,* 411 U.S. at 499. Indeed, *Heck* explicitly linked the situation before it – a prisoner seeking damages – to the rationale of *Preiser,* noting that a damage claimant attacking his conviction "can be said to be 'attacking . . . the fact or length of . . . confinement.'" 512 U.S. at 482 (quoting *Preiser*).

[9] The action should be allowed to proceed, however, where "the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff." *Id.* at 487.

Justice Souter, joined by Justices Blackmun, Stevens, and O'Connor, wrote a separate opinion concurring in the judgment, emphasizing that the result in *Heck* was compelled by the reasoning in *Preiser v. Rodriguez,* which held that it would frustrate Congress's explicit intent as embodied in the habeas statute's exhaustion requirement to permit a state prisoner to attack his conviction or sentence under § 1983 without exhausting state remedies. *Id.* at 497 (Souter, J., concurring in the judgment). In Justice Souter's view, "[t]his conclusion flows . . . from a recognition that 'Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, [a] specific determination [that] must override the general terms of § 1983.'" *Id.* at 498 (citing *Preiser,* 411 U.S. at 490). Similarly, Justice Thomas's separate concurrence described the Court's task as one of harmonizing § 1983 and the federal habeas corpus statute, and joined the Court's opinion on the understanding that the Court was limiting the scope of § 1983 consistent with "the federalism concerns undergirding the explicit exhaustion requirement of the habeas statute. . . . " *Id.* at 490-491 (Thomas, J., concurring).

The next decision regarding the intersection of § 1983 and federal habeas corpus, *Edwards v. Balisok,* 520 U.S. 641 (1997), involved the question whether a state prisoner's claim for damages and declaratory relief challenging the validity of the procedures by which he was deprived of good-time credits is cognizable under § 1983. *Id.* at 643. The prisoner in *Edwards,* Jerry Balisok, filed a § 1983 action alleging that his due process rights were violated by a biased hearing officer who concealed exculpatory evidence and excluded witnesses' testimony in his defense. Though his punishment included loss of 30 days of good-time credits, he did not request their restoration, which would have made habeas his exclusive remedy

under *Preiser,* but instead only sought damages for the unconstitutional procedures employed in the disciplinary hearing. *Id.* at 645. The Ninth Circuit held that the claim was cognizable under § 1983 because it challenged only procedures rather than the actual loss of the good-time credits. *Id.* at 644. This Court reversed, holding that regardless of what remedy Balisok sought, his allegations of bias "would necessarily imply the invalidity of the deprivation of his good-time credits," *id.* at 646, establishing his entitlement to earlier release.

The result in *Edwards* was compelled by the well-established principles of *Preiser* and its progeny that if the unlawfulness of the actions the prisoner is attacking would void his conviction or duration of confinement, the § 1983 claim is cognizable only when the conviction or loss of good-time credits has previously been invalidated. *Heck v. Humphrey,* 512 U.S. at 482-483, 486-487; *Preiser v. Rodriguez,* 411 U.S. at 499-500. Most lower courts have properly interpreted *Edwards* as a case about good-time credits – that is, a case that merely applies *Heck*'s favorable termination requirement to challenges affecting the fact or duration of the prisoner's confinement because they address the legality of loss of good-time credits. *See, e.g., Moran v. Sondalle,* 218 F.3d 647, 650-651 (7th Cir. 2000) (*per curiam*). The Sixth Circuit has not conformed, however, and has instead read *Edwards* as barring § 1983 suits that would imply the invalidity of a disciplinary punishment even when a favorable ruling would *not* affect the fact or duration of a prisoner's sentence. *See Huey v. Stine,* 230 F.3d 226, 231 (6th Cir. 2000) (barring § 1983 challenge to disciplinary infraction where a favorable ruling would require the court to "annul the judgment of the Michigan Department of Corrections"); JA 106. The Court's unanimity and the absence of any explicit departure from *Preiser* undermine this radical reading of *Edwards.* Of the two federal circuits that most readily

embraced this approach in published decisions, the Seventh Circuit has unequivocally repudiated it in favor of an understanding that adheres to *Preiser*'s fundamental distinction between fact-or-duration and conditions cases,[10] and the Sixth Circuit appears now to be in conflict, having recently issued one *en banc* decision that seems to back away from *Huey v. Stine,* another that ostensibly supports it, and several subsequent unpublished decisions that continue to follow *Huey.*[11]

The most recent decision of this Court commenting on the habeas-§ 1983 conflict was *Spencer v. Kemna,* 523 U.S.

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[10] In *DeWalt v. Carter,* 224 F.3d 607 (7th Cir. 2000), which held that a prisoner could challenge the loss of his prison job under § 1983 without having previously invalidated the underlying disciplinary sanction, the Seventh Circuit overruled *Stone-Bey v. Barnes,* 120 F.3d 718 (7th Cir. 1997), which held that under *Edwards v. Balisok, Heck's* favorable termination rule applied to judgments rendered in the prison disciplinary setting. The Seventh Circuit later confirmed in *Moran v. Sondalle,* 218 F.3d 647, 650-651 (7th Cir. 2000), that *Edwards* was limited to "administrative orders revoking good-time credits or equivalent sentence-shortening devices."

[11] In its recent decision in *Dotson v. Wilkinson,* 329 F.3d 463 (6th Cir. 2003) (*en banc*), the Sixth Circuit, rejecting an argument that *Edwards'* use of the term *judgment* could refer to the decision of a parole board, held that a prisoner could bring a procedural challenge to a parole determination under § 1983 because such challenges did not "necessarily imply the invalidity of the prisoner's conviction or sentence." *Id.* at 471 n.2 & 472. *Dotson* did not explicitly overrule or even cite *Huey,* however, and in *Goodwin v. Ghee,* 330 F.3d 446 (6th Cir. 2003), another *en banc* case issued the same day as *Dotson,* the Court sent a conflicting signal when it affirmed by an equally divided court a district court ruling barring a prisoner's § 1983 action challenging the retaliatory actions of the Ohio Parole Board on the grounds that a ruling in his favor would invalidate the board's denial of his parole. Since *Dotson* and *Goodwin,* at least two unpublished decisions have followed *Huey v. Stine* without citing *Dotson. Ruiz v. Martin,* 2003 WL 21698889 at *3 (6th Cir. July 17, 2003); *Carico v. Benton, Ireland, and Stovall,* 68 Fed. Appx. 632, 639-640 (6th Cir. 2003).

1 (1998), which addressed the question whether a habeas petitioner already released from prison could satisfy the case-or-controversy requirement in challenging a parole revocation decision – answering that he could not. Both Justice Scalia writing for the majority and Justice Souter in concurrence commented on the habeas-§ 1983 collision issue in response to the petitioner's argument that habeas had to be available to him because *Heck v. Humphrey* foreclosed a remedy under § 1983 given that the petitioner was already out of custody and thus incapable of meeting the favorable termination requirement. *Id.* at 988. Justice Scalia viewed this argument as "a great non sequitur" and rejected the contention that a § 1983 action for damages "must always and everywhere be available." *Id.* Justice Souter, joined by Justices O'Connor, Ginsburg, and Breyer, indicated that a former prisoner no longer in custody, such as the petitioner in that case, should be able to bring a § 1983 action establishing the unconstitutionality of a conviction without meeting a favorable termination requirement that was impossible to meet. *Id.* at 989-990 (Souter, J., concurring). Justice Stevens dissented, but agreed with Justice Souter that the petitioner could bring an action under § 1983 given the Court's holding that he does not have a remedy under the habeas corpus statute. *Id.* at 992 (Stevens, J., dissenting).

B. Extension of a Favorable Termination Requirement to Section 1983 Conditions Cases Would Not Serve to Effectuate Congress's Intent in the Federal Habeas Corpus Statute – the Only Valid Basis Under *Preiser v. Rodriguez* for Categorically Limiting the Scope of Section 1983.

Whether a plaintiff who wishes to bring a § 1983 suit challenging only the conditions of his confinement must satisfy the favorable termination requirement of *Heck v.*

Humphrey is a question this Court essentially answered in *Preiser v. Rodriguez* – before *Heck* even formalized the requirement – when it stated that "a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." 411 U.S. at 499. The dichotomy between conditions cases and fact-or-duration cases was central to the analytical underpinnings of the *Preiser* holding, and the cases succeeding *Preiser* assume its ongoing vitality. *See, e.g., Heck v. Humphrey,* 512 U.S. at 481-482 (characterizing certain damages claims as attacking the fact or duration of confinement under *Preiser*); *McCarthy v. Bronson,* 500 U.S. 136, 140 (1991) (noting *Preiser*'s distinction between fact-or-duration and conditions cases); *Porter v. Nussle,* 534 U.S. at 527 (same).

The single aim of the favorable termination requirement, as well as its precursor in *Preiser,* is to square § 1983's expansive language with the specific exhaustion requirement of the federal habeas corpus statute in circumstances where the two clash – that is, where the statutory language of § 1983 plainly encompasses the prisoner's claim but the remedy he would get, if successful, would be the quintessential habeas corpus relief of release from prison upon invalidation of his conviction or deprivation of good-time credits. "The essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and the traditional function of the writ is to secure release from illegal custody." *Preiser,* 411 U.S. at 484. To enforce Congress's intent in the habeas statute, therefore, *Preiser* concluded that a § 1983 suit was not cognizable, and that habeas was the sole federal remedy, where the suit attacked the very fact or length of the inmate's physical confinement. *Id.* at 487-488. Petitioner's challenge in this case to his treatment in prison raises no such concerns, and thus there is no basis for requiring him

to obtain relief from state officials before pursuing his federal remedy under § 1983.

The *Heck v. Humphrey* test, which asks whether "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," *id.* at 487, derives directly from the *Preiser* fact-or-duration test. *See id.* at 481-482 (noting that a claim that necessarily demonstrates the invalidity of the conviction is one in which "the claimant *can* be said to be 'attacking . . . the fact or length of . . . confinement' "). As Justice Souter observed, *Heck* is best read as ruling that "after enactment of the habeas statute *and because of it*, prison inmates seeking § 1983 damages in federal court for unconstitutional conviction or confinement must satisfy a requirement analogous to the malicious-prosecution tort's favorable-termination requirement." *Id.* at 500 (Souter, J., concurring in the judgment) (emphasis added). Thus *Heck* was continuing the task that the Court began in *Preiser,* which was to identify a means of harmonizing the broad language of § 1983 with the specific terms of the federal habeas corpus statute. *Id.* at 480 (describing the case as lying at the "intersection" of the two statutes). That is particularly clear from the fact that Justice Thomas, one of the five Justices in the majority, conditioned his vote in part upon the understanding that the Court's holding stemmed from the need to reconcile § 1983 and the habeas statute's exhaustion requirement. *Id.* at 491 (Thomas, J., concurring); *cf. also Marks v. United States,* 430 U.S. 188, 193 (1977) (when no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"); *Lurie v. Wittner,* 228 F.3d 113, 130 (2d Cir. 2000) (deeming concurring opinion that is arguably more narrow

than the Supreme Court's plurality opinion to "constitute[ ] the holding of the Court").

Notwithstanding the Sixth Circuit's contrary understanding, this Court's decision in *Edwards v. Balisok* reaffirmed *Preiser*'s reasoning that any limitations upon § 1983 must extend only to fact-or-duration challenges in the core of habeas corpus. *Edwards,* 520 U.S. at 646; *see also Brown v. Plaut,* 131 F.3d 163, 168 (D.C. Cir. 1997) (noting, after *Edwards,* that "the [Supreme] Court has never deviated from *Preiser's* clear line between challenges to the fact or length of custody and challenges to the conditions of confinement"). The favorable termination requirement would not have applied in *Edwards* if the sanction in question – the loss of good-time credits – had not affected the duration of the inmate's confinement. Indeed, the question presented, in the view of the unanimous Court, was "whether a claim for damages and declaratory relief brought by a state prisoner challenging the validity of the procedures used to deprive him of good-time credits is cognizable under § 1983." 520 U.S. at 643. The holding in *Edwards* that the petitioner's allegations of bias and dishonesty "necessarily imply the invalidity of the deprivation of his good-time credits" constitutes a straightforward application of *Preiser* to a procedural challenge to prison disciplinary hearings.[12]

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[12] Nearly all of the federal circuit courts have held that *Heck* and *Edwards* only require favorable termination with regard to disciplinary punishment that bears on the fact or duration of the inmate's sentence. *Jenkins v. Haubert,* 179 F.3d 19 (2d Cir. 1999); *Leamer v. Fauver,* 288 F.3d 532 (3d Cir. 2002); *Clarke v. Stalder,* 154 F.3d 186, 189 (5th Cir. 1998); *Moran v. Sondalle,* 218 F.3d 647 (7th Cir. 2000); *Sheldon v. Hundley,* 83 F.3d 231, 233 (8th Cir. 1996); *Ramirez v. Galaza,* 334 F.3d 850 (9th Cir. 2003); *Harden v. Pataki,* 320 F.3d 1289 (11th Cir. 2003); *Brown v. Plaut,* 131 F.3d 163 (D.C. Cir. 1997).

Petitioner's § 1983 claim is an attack upon *conditions*, not the fact or duration of his confinement.[13] No matter how successful, Petitioner's claim will not jeopardize his underlying conviction or the duration of his sentence. Under *Preiser* and its progeny, the favorable termination requirement does not apply to Petitioner's case, and there is no basis for judicially contriving such a prerequisite in a case that triggers no conflict with the federal habeas statute.

That some conditions claims might also be cognizable in habeas is an immaterial complexity. As an initial matter, while many federal appellate courts have reasonably held that prisoners can use the habeas statute to challenge conditions,[14] this Court has left the question open.[15] In any event, this Court identified and developed

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[13] The questions presented in this case, which were drafted by the Court after it granted Petitioner's *pro se* petition for writ of certiorari, correctly assume that Petitioner's § 1983 suit challenges only the conditions of his confinement. *See Wolff v. McDonnell*, 418 U.S. at 547 (recognizing that forfeiture of good-time credits "affects the term of confinement" while "confinement in a disciplinary cell ... involves alteration of the conditions of confinement"); *Sandin v. Conner*, 515 U.S. 472, 487 (1995) (prisoner's 30 days in segregation did not "present a case where the State's action will inevitably affect the duration of his sentence); *id.* at 486 n.9 (referring to disciplinary segregation as "the conditions suffered").

[14] *See, e.g., Boston v. Carlson*, 884 F.2d 1267, 1269 (9th Cir. 1989) (habeas is available to inmates seeking release "not from prison but just from a more to a less confining form of incarceration"); *Del Raine v. Carlson*, 826 F.2d 698, 702 (7th Cir. 1987); *Brennan v. Cunningham*, 813 F.2d 1, 4-5 (1st Cir. 1987).

[15] In *Bell v. Wolfish*, 441 U.S. 520, 527 n.6 (1979), this Court specifically reserved "the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself." *See* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1637 (2003) ("Although it's clear that a prisoner may not seek to alter the fact or

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the *Preiser* fact-or-duration test fully mindful of the significant overlap between § 1983 and habeas for claims that are outside the core of habeas corpus. Before *Preiser*, this Court suggested in *Wilwording v. Swenson* that habeas is available to challenge some prison conditions, 404 U.S. at 251, and *Preiser* itself acknowledged that habeas corpus is arguably available to challenge "additional and unconstitutional restraints during [an inmate's] lawful custody." 411 U.S. at 499. Despite the existence of concurrent federal remedies, it is those core habeas cases attacking the fact or duration of the inmate's confinement that thwart Congress's intent to permit federal courts to undo unconstitutional criminal convictions only after an inmate exhausts all state remedies.

Exhaustion in the habeas corpus statute preserves federal-state comity and allows "the State to deal with ... peculiarly local problems on its own, while preserving for the state prisoner an expeditious federal forum for the vindication of his federally protected rights, if the State has denied redress." *Preiser*, 411 U.S. at 497-498; *see also Fay v. Noia*, 372 U.S. 391 (1963). The dichotomy between § 1983 conditions cases and cases about the legitimacy of the underlying criminal judgment has proven to be a well founded and workable principle that balances the objectives of both § 1983 and the habeas statute and that litigants and judges can comprehend. This Court best honors Congress's intent by reaffirming the enduring rationale of *Preiser* and its progeny.

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duration of his confinement in a nonhabeas suit, the reverse – whether habeas actions may challenge the conditions of confinement as well as its fact or duration – is less settled." (footnotes omitted)).

C. The Prison Litigation Reform Act Confirms That Congress Intended To Require Prisoners To Exhaust, But Not To Favorably Terminate, Their Attacks on Conditions of Their Confinement Before Pursuing an Action Under Section 1983.

Any doubt as to Congress's intent with respect to exhaustion in prison conditions cases was dispelled in 1996 by the enactment of the Prison Litigation Reform Act (PLRA). In explicitly requiring exhaustion of "such administrative remedies as are available" for § 1983 actions, like Petitioner's, that challenge the conditions of confinement, 42 U.S.C. § 1997e(a), the PLRA demonstrates that Congress intended an administrative exhaustion requirement, but not a favorable termination requirement involving judicial remedies, to apply in such cases. Extending the favorable termination requirement from fact-or-duration cases to conditions cases would flout Congress's precise objectives under the PLRA.

This Court faced a surprisingly similar task of statutory interpretation more than two decades ago in *Patsy v. Board of Regents,* 457 U.S. 496 (1982), when it addressed the question whether § 1983 required exhaustion of state administrative remedies. In the Court's view, neither the statute's language nor its legislative history supported making exhaustion a precondition to a § 1983 action, and the statute's aim of making federal courts the defenders of the people's civil rights seemed antithetical to such a requirement. *Id.* at 502-508.

Most persuasive to the Court, however, was the inescapable significance of a limited exhaustion requirement that Congress *did* create in the Civil Rights of Institutionalized Persons Act, a precursor to the PLRA that permitted a district court to stay an adult prisoner's

§ 1983 action to allow exhaustion of state remedies under certain limited circumstances. 42 U.S.C. § 1997e. Congress "clearly expressed its belief that a decision to require exhaustion for certain § 1983 actions would work a change in the law," which bolstered the Court's conclusion in *Patsy* that "[a] judicially imposed exhaustion requirement would be inconsistent with Congress's decision to adopt [CRIPA]." *Id.* at 508. The decision to enact such an exhaustion requirement for certain prisoner claims also manifested Congress's intent that other § 1983 suits outside the prison context remain unencumbered by any exhaustion requirement. *Id.* at 509.

On the merits, *Patsy* verifies that § 1983 in itself contains no general limitations that could be interpreted as a requirement to exhaust *or* to favorably terminate state remedies – a conclusion that is consistent with the need in *Preiser v. Rodriguez* and *Heck v. Humphrey* to recognize exceptions to that rule only in those § 1983 actions that threaten the integrity of the habeas statute's rule of exhaustion. *Patsy's* analysis of CRIPA similarly negates any argument in favor of a judicially created favorable termination requirement in prison cases that do not involve the fact or duration of confinement. Congress has explicitly spoken in the PLRA regarding the extent and manner in which it believes prisoners should be directed to state remedies in prison conditions cases. If, as this Court held in *Patsy,* Congress's decision to adopt CRIPA was inconsistent with a reading of § 1983 to include a general administrative exhaustion requirement, it is necessarily also true that Congress's enactment of the PLRA (as well as CRIPA before it) forbids reading a favorable termination requirement into § 1983 conditions suits. And, as in *Patsy,* policy arguments allegedly supporting a broader requirement of resort to state remedies

than Congress passed, *see, e.g., Patsy,* 457 U.S. at 512, are inconsequential.

Whether a favorable termination requirement for § 1983 conditions claims would make good policy sense is a legislative rather than a judicial dilemma – and a legislative dilemma Congress has already solved. "It is not for us to say whether Congress will or should create a similar scheme for other categories of § 1983 claims or whether Congress will or should adopt an altogether different exhaustion requirement for nonprisoner § 1983 claims." *Patsy,* 457 U.S. at 515. This Court deemed the question uniquely suited to resolution by Congress, with its "superior institutional competence to pursue this debate." *Id.* at 513. That conclusion pertains equally to the question whether § 1983 should be amended to include a favorable termination requirement for challenges to prison conditions.

The favorable termination requirement stems "not from a preference about how the habeas and § 1983 statutes ought to have been written, but from a recognition that 'Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement.'" *Heck v. Humphrey,* 512 U.S. at 498 (Souter, J., concurring in the judgment) (citing *Preiser,* 411 U.S. at 490). As the very existence of the PLRA confirms, extension of the favorable termination rule to § 1983 conditions cases would "usurp policy judgments that Congress has reserved for itself," *Patsy,* 457 U.S. at 508, by ignoring Congress's unambiguous intent in creating its own rule of administrative exhaustion for such cases.

D. The Favorable Termination Principle, Rooted in the Habeas Corpus Exhaustion Requirement, Has No Application to a Prison Disciplinary Proceeding That Does Not Affect the Duration of Custody.

While the vast majority of federal appellate decisions have held that the favorable termination rule does not bar any § 1983 conditions suits, the Sixth Circuit and some panels of the Tenth Circuit have persisted – based primarily on a misreading of *Edwards v. Balisok* – in applying the requirement to claims challenging the punishment imposed in prison disciplinary hearings, even when that punishment did not affect the fact or duration of custody.[16] But there is no principled basis for treating constitutional challenges to prison disciplinary hearings that do not prolong a prisoner's incarceration differently from other types of constitutional challenges to prison conditions. This distinction flatly contradicts this Court's consistent application of *Preiser*'s bright line rule clearly differentiating conditions cases from fact-or-duration-of-confinement cases, relinquishes the advantage of clarity that comes with that rule, and has no independent justification in

[16] *See Huey v. Stine,* 230 F.3d at 228-230. The Tenth Circuit's opinions are unpublished: *Easter v. Saffle,* 51 Fed. Appx. 286 (10th Cir. 2002) ("Although Easter claims that he is not seeking revocation of the punishment imposed by the prison disciplinary board, were we to find that his claims had merit, the correctness of that punishment would necessarily be implicated. Therefore, *Heck* applies."); *Cotton v. Simmons,* 23 Fed. Appx. 994 (10th Cir. 2002) ("Mr. Cotton failed to show that his disciplinary determination has been reversed or called into question. Thus, Balisok bars Mr. Cotton's claims regarding the disciplinary proceedings."); *but see Vann v. Bureau of Investigation,* 28 Fed. Appx. 861 (10th Cir. 2001) ("Before bringing a damage claim that casts doubt on the length of a prisoner's continued incarceration, the prisoner must first pursue a successful action for habeas corpus.").

§ 1983 itself. Even if there were some justification for such a perversion of this Court's unswerving jurisprudence, it would not apply in this case, as Petitioner concedes his guilt of the lesser offense of insolence and is attacking something other than the actual result of the disciplinary hearing.

1. Application of the Favorable Termination Requirement Here Would Defy Congress's Intent and Cross *Preiser*'s Bright Line

Edwards v. Balisok barred a prisoner from using § 1983 to challenge the procedures of a disciplinary hearing that resulted in the loss of good-time credits. Most courts properly read *Edwards* as an unremarkable case that applied the rule of *Preiser* and its progeny by requiring favorable termination because the prisoner's lawsuit ultimately attacked the duration of his sentence. *See, e.g., Torres v. Fauver,* 292 F.3d at 147; *Jenkins v. Haubert,* 179 F.3d 19, 27 (2d Cir. 1999); *Brown v. Plaut,* 131 F.3d at 167-168. The few that have misconstrued *Edwards* have typically seized upon its single mention of the "invalidity of the *punishment imposed*," 520 U.S. at 648 (emphasis added), as opposed to its other references to the invalidity of "a conviction or sentence," *id.* at 646, or "the invalidity of the deprivation of his good-time credits," *id.*, and then misinterpreted that phrase to require favorable termination for any prisoner who was using § 1983 to challenge the result of a disciplinary hearing.[17]

[17] *See Huey v. Stine,* 230 F.3d 226; *Riley v. Kurtz,* 1999 WL 801560 at *6 (6th Cir. Sept. 28, 1999) (relied on in *Huey*); *Easter v. Saffle,* 51 Fed. Appx. 286 (10th Cir. 2002); *Cotton v. Simmons,* 23 Fed. Appx. 994

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The phrase *the punishment imposed* was unquestionably restricted to the punishment imposed *in that case* – a deprivation of good-time credits that fell within *Preiser's* definition of core habeas cases because it affected the length of the inmate's sentence. Any contrary reading of *Edwards* is belied by the unanimity of the decision, the utter absence of any suggestion that the Court intended a radical departure from a consistent line of cases that preclude this reading, and the lack of any textual or historical basis in § 1983 for extending the favorable termination principle beyond its origins in the core of habeas corpus. Any other reading would also result in the confusion and unpredictability that have characterized the case law of those circuits – particularly the Sixth Circuit – that have deviated from *Preiser*'s bright line. Indeed, five years after *Edwards* this Court continued to recognize only "two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement," *Porter v. Nussle,* 534 U.S. at 527, a characterization inconsistent with an approach that singles out one discrete type of conditions case for treatment previously reserved for fact-or-duration cases.

2. The Text and History of Section 1983 Do Not Independently Warrant a Favorable Termination Requirement Here

Because application of the favorable termination rule to prison disciplinary hearings not affecting the fact or duration of custody is unjustified under *Preiser,* the only

(10th Cir. 2002); *see also Stone-Bey v. Barnes,* 120 F.3d 718 (7th Cir. 1997), *overruled by DeWalt v. Carter,* 224 F.3d 607 (7th Cir. 2000).

possible basis for applying the requirement to such cases would be that it was somehow contained within § 1983 itself. Yet the historical purpose of § 1983 defeats any argument that Congress always intended such a rule as an affirmative ingredient of a § 1983 claim arising from prison conditions litigation. There is no reason to believe that the 1871 Congress that enacted § 1983 would have shared the Sixth Circuit's concern about "unwind[ing] the judgment of the state agency" when addressing the constitutionality of prison disciplinary procedures. JA 106 (citing *Huey v. Stine,* 230 F.3d at 230).

The federal judge looms large in § 1983. The legislation's primary rationale was to involve federal courts in the task of protecting the federal rights of citizens in the face of the largely unchecked actions of state authorities in violation of those rights. *See Steffel v. Thompson,* 415 U.S. 452, 472-473 (1974) (acknowledging "the paramount role Congress has assigned to the federal courts to protect constitutional rights"); *Patsy,* 457 U.S. at 503 (same). The origin, the purpose, and the plain language of § 1983 evince a congressional intent to ensure a federal forum for a class of civil rights offenses committed in the name of the state and as to which state judges were thought unlikely to be impartial and fully protective of constitutional rights. It would be a cruel historical irony to engraft onto a federal civil rights remedy specifically intended to redress the abuses and deficiencies of state systems of justice a requirement that a plaintiff prevail before the state before he may invoke the federal remedy.[18]

[18] Such an anomaly does not exist in *Heck* or *Edwards* because the opportunity for favorable termination includes a federal habeas forum, the one that Congress intended for litigation of challenges to state court convictions and duration of confinement.

Quintessential tort claims about the constitutionality of prison conditions routinely arise in a disciplinary context, including cases this Court has treated as valid § 1983 actions. In the hitching post case itself, which asserted an Eighth Amendment claim under § 1983, the prison guards handcuffed the prisoner to the hitching post as punishment for misbehaving at a chain gang worksite. *Hope v. Pelzer,* 536 U.S. at 734. Relatedly, where a Muslim prisoner is sentenced to ten days in isolation solely because the hearing officer hates Muslims, his right to pursue a federal remedy under § 1983 cannot reasonably hinge on whether that brazen unconstitutional action was associated with a disciplinary proceeding. Indiscriminate application of the favorable termination rule to disciplinary proceedings would bar the Muslim prisoner's § 1983 claim – the very case the statute was designed to remedy – and would give the state, whether it be the warden or the state supreme court (in states that choose to have judicial review of prison administrative proceedings), the equivalent of veto power over the prisoner's right to federal review of his constitutional claim.[19]

[19] Notably, application of the favorable termination rule to disciplinary proceedings not affecting the fact or duration of custody would not curb the number of procedural due process challenges to disciplinary hearings because this Court has already held that unless the discipline "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," prisoners have no liberty interest in avoiding administrative punishments that do not affect the duration of an inmate's sentence. *Sandin v. Conner,* 515 U.S. 472, 484, 487 (1995); *see also id.* at 485 ("Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law."). This Court did not eliminate such claims on the theory that the state should be the final arbiter of constitutional rights, but because of its conclusion that the prisoner has no constitutional right that warrants protection.

The history and purpose of the habeas corpus statute also preclude any extrapolation from *Edwards* that would require favorable termination in all § 1983 challenges to the punishment imposed at disciplinary proceedings, even those that do not affect the duration of sentence. The writ extends to a prisoner when "[h]e is in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2241, and its principal function is to get an inmate out of illegal custody. Like an attack on the criminal judgment itself, litigation over good-time credits also affects an inmate's term in prison and is conducive to resolution in habeas corpus because the remedy sought is to get out of prison sooner. It is also conducive to litigation in habeas because a prisoner who is serving anything but the shortest sentence will have time to litigate the loss of good-time credits while the remedy – restoration of those credits – would still be meaningful. Challenges to administrative segregation and other forms of disciplinary punishment, on the other hand, are about how an inmate is treated while in prison, rather than when he will get out, and are therefore not core habeas claims. Their fleeting nature also makes disciplinary conditions cases a poor fit for habeas, if they are cognizable in habeas at all.

The highly discretionary and often slapdash nature of prison disciplinary hearings provides further insight into why Congress intended to require administrative exhaustion in the PLRA, but not favorable termination, of § 1983 attacks on disciplinary punishments outside of core habeas. Congress believes application of the habeas exhaustion doctrine is warranted when a defendant seeks to invalidate a conviction that has resulted from a criminal trial, as "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Rose v. Lundy,* 455 U.S. 509, 518 (1982) (quotation marks omitted). Even

where concern for comity is greatest – as in attacks in habeas upon the criminal trial, "the 'main event' at which a defendant's rights are to be determined," *McFarland v. Scott,* 512 U.S. 849, 859 (1994) – Congress has required exhaustion prior to federal review, but has by no means given states the power to preclude federal review altogether, as the favorable termination requirement would do in disciplinary conditions cases.

The concern for comity is far less compelling when applied to a prison disciplinary proceeding that is not judicial in nature and that does not affect the implementation of a judicially imposed sentence. The function of hearing officers in prison disciplinary matters is not "a 'classic' adjudicatory one." *Cleavinger v. Saxner,* 474 U.S. 193, 203 (1985). "Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell,* 418 U.S. at 556; *see also Sandin v. Conner,* 515 U.S. 472, 487 (1995) (prisoners have no liberty interest in avoiding administrative segregation). Prisoners facing disciplinary action typically have no lawyer or independent representative, no right to compel witnesses' attendance or to cross-examine, no right to discovery, no verbatim transcript, no precise burden of proof, and no restriction on hearsay and self-serving information. *Cleavinger,* 474 U.S. at 206. To label the members of the disciplinary committee "independent" would be "to ignore reality," as they are prison employees who are the subordinates of the warden reviewing their decision, who work with the employee who charged the inmate they are judging, and who are "under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee." *Id.* at 203-204, 206. The misguided decisions of the Sixth and Tenth Circuits that have found considerations of comity to be overriding in conditions claims arising from such hearings have

somehow overlooked Congress's unambiguous intent to account for these concerns in a far more limited way by requiring administrative exhaustion in the PLRA.

3. Petitioner Is Not Challenging the Punishment Imposed at a Disciplinary Hearing

Finally, even if it were legitimate to require favorable termination in § 1983 claims arising in disciplinary contexts outside the heart of habeas, which it is not, the rule still should not bar Petitioner's lawsuit because Petitioner is not challenging the result of his disciplinary proceeding. Throughout this litigation Petitioner has conceded that he was guilty of the lesser offense of insolence, and focused his challenge upon Respondent's retaliatory acts and his decision to charge a more serious offense – threatening behavior – than the offense that Petitioner actually committed. *See* Record at 8; Brief in Opposition 27a (Petitioner "agrees he was guilty of Insolence"). As the Magistrate Judge noted, then, the only punishment that was "definitely in issue" was the six-day mandatory prehearing detention that resulted from Respondent's choice to charge a "nonbondable" offense that required such detention. Brief in Opposition 27a. Thus, Petitioner's claim, if successful, would not imply the invalidity of the length of his sentence *or* the invalidity of the punishment imposed at the disciplinary hearing.

The circumstances of Petitioner's case exemplify the difficulties inherent in any deviation from *Preiser's* bright-line rule, a deviation implicit in those lower court decisions that have misread *Edwards* to suggest that all conditions cases involving disciplinary proceedings – not just those involving good-time credits – are subject to the favorable termination rule. Petitioner's case is analogous to a situation in which a citizen who is racially targeted for

arrest also resists that unlawful arrest.[20] Just as the officers' violation of the minority victim's rights is not a defense to resisting arrest, Petitioner's complaint about Respondent's violation of his First Amendment rights was not an issue capable of meaningful litigation in the disciplinary hearing on Petitioner's misconduct charge: he could still be guilty of insolence notwithstanding the constitutional violation. Yet both the victim of unlawful arrest and Petitioner should have a cause of action under § 1983 for their respective constitutional claims, separate and apart from the criminal prosecution or disciplinary process.

E. Conclusion

From *Preiser* to *Spencer,* this Court's decisions on the interplay between § 1983 and habeas corpus have consistently maintained an analytically crisp distinction between fact-and-duration and conditions cases that effectuates Congress's intent in the habeas exhaustion requirement and that judges and prisoners can understand and apply with ease. After a false start in *Stone-Bey v. Barnes* (the overruled case whose misreading of *Edwards* obliterated the bright line of *Preiser*), the Seventh Circuit now properly characterizes the resolution of the habeas-§ 1983 conflict as "simple": "State prisoners who want to challenge their convictions, their sentences, or administrative orders revoking good-time credits or

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[20] The analogy is fitting because § 1983 is just as concerned with how people are treated in prison – where inmates have much more interaction with state actors – as it is with how police officers and other state actors treat people outside the prison walls. "There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell,* 418 U.S. at 555-556.

equivalent sentence-shortening devices, must seek habeas corpus, because they contest the fact or duration of custody," while constitutional challenges "to any other decision," including administrative segregation, may proceed through § 1983. *Moran v. Sondalle,* 218 F.3d at 650-651. This view is inescapable in light of the history and purpose of § 1983 as a "uniquely federal remedy," *Mitchum v. Foster,* 407 U.S. at 239, the underpinnings of the favorable termination rule as articulated in *Preiser,* and the clear indication in the PLRA that Congress intended to require exhaustion of administrative remedies, but not favorable termination, in § 1983 challenges to prison conditions. This Court should reverse the Sixth Circuit's judgment that *Heck* bars Petitioner's action under § 1983.

II. A PRISON INMATE WHO HAS BEEN, BUT IS NO LONGER, IN ADMINISTRATIVE SEGREGATION MAY BRING A SECTION 1983 SUIT CHALLENGING THE CONDITIONS OF HIS CONFINEMENT WITHOUT FIRST SATISFYING THE FAVORABLE TERMINATION REQUIREMENT OF *HECK V. HUMPHREY*

The question whether an inmate may bring a § 1983 action to challenge his prior placement in administrative segregation once he is released from segregation stems from an assumption that such a suit would otherwise require compliance with *Heck v. Humphrey's* favorable termination rule. Thus, if § 1983 suits challenging conditions are *not* subject to the favorable termination rule, such a suit is presumably available to the inmate whether he remains in segregation or not. *See Torres v. Fauver,* 292 F.3d 141, 145 (3rd Cir. 2002) (deeming it unnecessary to reach the question whether the favorable termination rule applies to persons who cannot seek habeas relief when the court concluded that the rule did not apply to challenges to prison disciplinary sanctions that did not affect the fact or

length of a prisoner's confinement). If this Court departs from the underlying rationale of *Preiser* and its progeny and determines that suits that do not challenge the fact or duration of an inmate's confinement *are* within the scope of *Heck's* favorable termination requirement, that requirement should not extend to inmates, such as Petitioner, who cannot invoke federal habeas corpus jurisdiction because they have been released from the heightened detention that is the subject of the challenge.[21]

Though this Court has never decided the question, statements appearing in majority, concurring, and dissenting opinions in *Heck v. Humphrey* and *Spencer v. Kemna* have articulated the basic arguments on both sides. The issue first appeared in a footnote of *Heck v. Humphrey,* where Justice Scalia, writing for the majority, rejected the suggestion Justice Souter made in his opinion concurring in the judgment that the favorable termination rule should not apply to those who were not "in custody" for habeas purposes. 512 U.S. at 490 n.10. In Justice Scalia's view, "the principle barring collateral attacks . . . is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated," and the Court's recognition of limitations upon § 1983 such as absolute immunity from liability for judicial officers demonstrates that not all violations of federal rights must have a remedy. *Id.*

For his part, Justice Souter noted that the Court's assertion was merely dicta, and argued the opposing view that the Court's holding should not "cast doubt on the

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[21] "[A]ll but one of the circuit courts to consider the issue have held[ ] that both current and former prisoners can use § 1983 to raise claims relating only to the conditions, and not the fact or duration, of their confinement without satisfying the favorable termination rule." *Torres v. Fauver,* 292 F.3d at 145.

ability of an individual unaffected by the habeas statute to take advantage of the broad reach of § 1983." *Id.* at 503 (Souter, J., concurring in the judgment). In Justice Souter's view, which Justices Blackmun, Stevens, and O'Connor joined, the common law analogy of malicious prosecution was just that, an analogy, and the Court's reliance upon the example of that tort did not change the basic underpinnings of the rule from *Preiser*, which sought only to effectuate the habeas exhaustion requirement. 411 U.S. at 489. It would be "an untoward result," Justice Souter stated, "to deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling" because "individuals not 'in custody' cannot invoke federal habeas jurisdiction, the only statutory mechanism besides § 1983 by which individuals may sue state officials in federal court for violating federal rights." *Id.* at 500.

The issue arose again in *Spencer v. Kemna,* where the Court declined to extend to a parole revocation challenge its rule that the collateral consequences of a criminal conviction warrant continuing standing for a habeas petitioner even after he is released from prison. 523 U.S. at 14. There, Justice Scalia, writing for the Court, rejected the petitioner's contention that habeas had to be available for his challenge to the propriety of his parole revocation because *Heck v. Humphrey* foreclosed a remedy under § 1983. Justice Scalia deemed this argument "a great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available." *Id.* at 17. Justice Souter, joined by Justices O'Connor, Ginsburg, and Breyer, agreed that the petitioner's argument was incorrect – not because the unavailability of a federal remedy was an acceptable

outcome, but because a federal remedy *was*, in fact, available in § 1983.[22] "The better view," according to Justice Souter, "is that a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Id.* at 21. The dissenting Justice Stevens also indicated his agreement with Justice Souter that if the petitioner did not have a remedy under the habeas statute, "it is perfectly clear . . . that he may bring an action under 42 U.S.C. § 1983." *Id.* at 24 n.8 (Stevens, J., dissenting).

The issue in the present case is somewhat different from the dicta in *Heck*'s footnote 10, as Petitioner here is challenging the conditions of his confinement rather than the validity of his underlying conviction or sentence. The same reasoning applies, however, whether a prisoner is precluded from filing a habeas petition to challenge an unlawful condition because he has already completed a short term of administrative segregation or whether he is barred from attacking his conviction itself under the habeas statute because he was only fined or has already served his sentence and is therefore not "in custody" for habeas purposes. In either context, the stance Justice Souter took in his concurrences in *Heck* and *Spencer* is "the better view." *Spencer,* 523 U.S. at 21.

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[22] Justice Ginsburg concurred separately, as well, to note that although she had joined the majority opinion in *Heck,* she had come to agree with Justice Souter's reasoning that "[i]ndividuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within § 1983's 'broad reach.'" *Id.* at 21 (Ginsburg, J., concurring).

Like conditions cases generally, § 1983 cases in which an inmate is barred from challenging his unlawful segregration on habeas are outside the heart of habeas corpus and therefore create no conflict with the habeas exhaustion doctrine. Under *Heck,* courts must dismiss § 1983 suits that would imply the invalidity of the inmate's custody "not because the favorable termination requirement was necessarily an element of the § 1983 cause of action for unconstitutional conviction or custody, but because it was a simple way to avoid collisions at the intersection of habeas and § 1983." *Spencer v. Kemna,* 523 U.S. at 20 (Souter, J., concurring) (internal quotations omitted). If a plaintiff is powerless to attack his conviction on habeas, his § 1983 action cannot frustrate any intent of Congress in the habeas exhaustion requirement. In the context of Petitioner's case, in particular – where the § 1983 action challenges a heightened detention within the prison rather than the fact of his incarceration generally – the threat to habeas corpus is nonexistent. Habeas corpus is an extraordinary remedy that Congress made available only to those "in custody" for purposes of the habeas statute; Congress did not concomitantly signal, however, that people with meritorious constitutional claims who were *not* in custody should not have a federal remedy for those claims.

There is considerable force to the argument that citizens whose federal rights have been violated by governmental actors should have *some* remedy in federal court. *Marbury v. Madison,* 5 U.S. 137, 162-163 (1803). But that argument is wholly unnecessary to the resolution of this issue. Even if, as Justice Scalia indicated in *Spencer,* review by a federal court must *not* "always and everywhere be available," 523 U.S. at 17, neither can a § 1983 action be randomly eliminated "when no limitation was required for the sake of honoring some other statute or weighty policy[.]" *Id.* at 20 (Souter, J., concurring).

In footnote 10 of *Heck,* Justice Scalia offered the example of absolute immunity for judicial officers to demonstrate that § 1983 has not been interpreted to provide "a remedy for all conceivable invasions of federal rights." 512 U.S. at 490 n.10. That example only strengthens the argument that prisoners who do not have the option of habeas should not be required to favorably terminate because it illustrates a consciously narrow limitation that this Court recognized based only upon a secure belief that Congress intended to incorporate the immunities that existed when the Civil Rights Act became law or it would have explicitly abrogated them. *See Wyatt v. Cole,* 504 U.S. 158, 163-164 (1992). This Court can and must devise ways of reconciling conflicting statutes, provided that it does so "in a principled fashion." *Heck,* 512 U.S. at 491 (Thomas, J., concurring). That authority does not, however, permit the imposition of a broad-based restriction on § 1983 that far exceeds the legitimate purpose of its precursor in *Heck* and *Preiser,* that is not validated by the language or the history of the statute, and that cannot fairly be characterized as what Congress intended.

Section 1983 is the proper remedy for a violation of federal rights by someone acting under color of state law unless there is a good reason to believe Congress intended to foreclose that remedy. That reason might be a failure to exhaust administrative remedies in a suit challenging prison conditions, running afoul of Congress's own words in the PLRA. Or it might be a failure to favorably terminate an action that challenged the fact or duration of an inmate's confinement, which would contravene *Heck*'s solution for avoiding collisions between habeas and § 1983. For an inmate like Petitioner, however, his challenge to the conditions of his confinement creates no conflict with any congressional enactment, and even if this Court determines that the favorable termination rule does apply

to § 1983 conditions claims, Petitioner's release from segregation eliminated any conflict with habeas corpus along with any reason for precluding Petitioner from using § 1983 to pursue his civil rights claim.

CONCLUSION

This Court should reverse the decision of the Sixth Circuit and remand to that court for further proceedings.

Respectfully submitted,

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In the Supreme Court of the United States

SHAKUR MUHAMMAD, aka John E. Mease,

Petitioner,

v.

MARK CLOSE,

Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

Whether a plaintiff who wishes to bring a §1983 suit challenging only the conditions, rather than the fact or duration, of his confinement, must satisfy the favorable termination requirement of *Heck v. Humphrey*.

Whether a prison inmate who has been, but is no longer, in administrative segregation may bring a § 1983 suit challenging the conditions of his confinement (i.e., his prior placement in administrative segregation) without first satisfying the favorable termination requirement of *Heck v. Humphrey*.

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42 U.S.C. § 1983 and 28 U.S.C. § 2254 are quoted in Petitioner's brief.

Michigan Compiled Laws (M.C.L.) 791.254:
(1) The department shall provide for a rehearing of a matter that was subject to a hearing, pursuant to this section. A rehearing may be ordered by the hearings administrator after a review of the record of the hearing. A rehearing may be held upon the request of a party or upon the department's own motion.
(2) A rehearing shall be ordered if any of the following occurs:
(a) The record of testimony made at the hearing is inadequate for purposes of judicial review.
(b) The hearing was not conducted pursuant to applicable statutes or policies and rules of the department and the departure from the statute, rule, or policy resulted in material prejudice to either party.
(c) The prisoner's due process rights were violated.
(d) The decision of the hearings officer is not supported by competent, material, and substantial evidence on the record as a whole.
(e) It is determined, based on fact, that the hearings officer conducting the hearing was personally biased in favor of 1 of the parties.
(3) A request for a rehearing shall be filed within 30 days after the final decision or order is issued after the initial hearing. A rehearing shall be conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for department reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.

* * *

M.C.L 791.255:
(1) A prisoner aggrieved by a final decision or order of a hearings officer shall file a motion or application for rehearing in order to exhaust his or her administrative remedies before seeking judicial review of the final decision or order.
(2) Within 60 days after the date of delivery or mailing of notice of the decision on the motion or application for the rehearing if the motion or application is denied or within 60 days after the decision of the department or hearing officer on the rehearing, a prisoner aggrieved by a final decision or order may file an application for direct review in the circuit court in the county where the petitioner resides or in the circuit court for Ingham county.

* * *

STATEMENT OF THE CASE

This is a civil rights action under 42 U.S.C. § 1983, brought by Petitioner Shakur Muhammad, a Michigan prison inmate,[1] against Respondent Mark Close, a Corrections Officer, alleging that Close improperly brought a prison misconduct charge against him. At all times relevant to this lawsuit Petitioner was incarcerated at the Standish Maximum Correctional Facility in Standish, Michigan.[2]

In the present case Petitioner claims that Respondent "framed" him and wrote a major misconduct ticket in retaliation for two lawsuits Petitioner had previously filed against Close and other MDOC officials. The facts underlying the present case occurred in May 1997, and Petitioner filed this lawsuit on June 2, 1998. The two lawsuits over which the alleged retaliation took place were filed approximately 30 months and 15 months, respectively, prior to the incident that is the subject of the present case.[3]

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[1] Petitioner is serving two concurrent sentences of 35 to 75 years imposed in 1990 after his convictions of assault with intent to commit murder and first-degree criminal sexual conduct.

[2] Petitioner Muhammad is currently incarcerated at the Ionia Maximum Correctional Facility (IMAX), which is the Michigan Department of Corrections' (MDOC) highest level prison and houses only those prisoners who have committed serious acts of violence while in prison or have shown themselves to be a serious management problem. Shortly after the events in this lawsuit, Petitioner severely injured two corrections officers. One officer received a neck injury and the other officer had a fractured leg, which required pins. Soon after that incident, Petitioner was transferred to IMAX, where he has remained ever since.

[3] Petitioner Muhammad filed his first lawsuit against Respondent Close and 13 others on December 21, 1994 (E. D. Mich. No. 94-CV-74936). Petitioner claimed that he was injured after a Corrections Officer named Toth backed a van in which Petitioner was riding into a parked car. Petitioner claimed that Officer Toth later wrote a "false" misconduct ticket in retaliation against him for filing a grievance against Officer Toth.

The incident took place when Petitioner and other inmates were in the dining room, also called the chow hall. Respondent and several other Corrections Officers were assigned the duty of supervising the "chow line" at the time. The chow hall is in a glass-enclosed room. Respondent was standing outside the chow hall, watching the inmates through the glass. (Deposition of Mark Close, pp. 36-41). After several minutes, Respondent noticed that Petitioner was staring at him through the glass window. Respondent gestured with his hands, palms up, as if to say, "what's wrong?" to Petitioner. Petitioner spoke, but because there was glass separating them, Respondent could not hear what Petitioner was saying so he then entered the chow hall to find out what Petitioner wanted. When Respondent entered the chow hall, Petitioner left his seat and rapidly approached him. Petitioner stood within inches of Respondent. After several seconds of this face-to-face confrontation, another officer who saw that something was about to happen came over and handcuffed Petitioner. Two officers then escorted Petitioner out of the chow hall.

After the incident, Respondent Close wrote a misconduct ticket for "Threatening Behavior." (Deposition of Mark Close, pp. 36-41). Threatening Behavior is defined in an MDOC Policy Directive as "Words, actions or other behavior which expresses an intent to injure or physically abuse another person. Such misconduct includes attempted assault and battery." (P.D. 03.03.105, Attachment B, p. 2; Jt. App. 40).

Because Threatening Behavior is a "non-bondable" offense, Petitioner was escorted to temporary administrative

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Summary judgment was granted in favor of all defendants on August 18, 1995. Petitioner filed his second lawsuit on February 23, 1996 (E. D. Mich. No. 96-CV-10053). Petitioner claimed, among other things, that the Respondent and four other defendants threatened him because of the previous lawsuit against Officer Toth. On December 24, 1996, the district court granted all defendants' motion to dismiss. (See Magistrate's Report and Recommendation, November 23, 1998; Brief Opp. Pet., App. 3a, n.1).

segregation immediately.[4] On May 27, 1997, six days after the incident, Petitioner was provided with a hearing, conducted by a hearing officer. Hearing officers in Michigan are attorneys who report directly to the Hearings Division at the MDOC's central office. M.C.L. 791.251. Hearing officers perform their duties independently from the warden and the prison staff.

In the major misconduct report (ticket, Jt. App. 54), Respondent stated that Petitioner "angerly [sic] walked toward [him] and looked very hostile." Respondent further explained that "he was in fear of being physically assaulted and or injured. [Petitioner's] face was contorted with veins bulging at his temples." Respondent described his gesture as follows: "I raised my hands up in the air and . . . kind of shrugged my shoulders as if to say 'what's wrong' but didn't say anything, and he said something to me, and I could not hear him, and so I started walking into the chow hall to see what was going on." (Deposition of Mark Close, p 37). Other witnesses supported Respondent's characterization of his movements and agreed that Petitioner was the instigator of incident. Deposition of Richard Metevia, pp 19-20, 21; Deposition of Darlene McIntire, p 23.

Petitioner Muhammad claims that Respondent Close stared at him and then made a gesture that Petitioner

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[4] For non-bondable charges, such as Threatening Behavior, an officer does not have any discretion in deciding whether to issue a ticket. "A major misconduct report shall be written if the behavior constitutes a non-bondable major misconduct charge." (Jt. App. 11, ¶ I). A prisoner charged with a non-bondable major misconduct must be confined to segregation or toplock until the hearing. (Jt. App. 14, ¶ 5). Although the term "administrative segregation" has been used throughout this litigation, the more precise term for purposes of misconduct is punitive detention. Administrative segregation involves removal from the general population and can also include segregation for the purpose of protection or because a prisoner is unmanageable in the general population as a result of being an escape risk or for some other reason. "Toplock" means that a prisoner cannot leave his cell, but is not physically moved out of the general population.

characterized as "a fighting stance."[5] (Amended Complaint, Jt. App. 67).

Even though Respondent subjectively felt threatened, an assessment shared by those officers who intervened, the hearing officer concluded that there were no "threats of physical injury or specific threats of assault" and therefore found Petitioner guilty of Insolence rather than Threatening Behavior. (Jt. App. 58). Insolence is defined as "Words, actions, or other behavior which is intended to harass, or cause alarm in an employee." (P.D. 03.03.105, Attachment B, p. 3; Jt. App. 44). Insolence is a lesser included offence of Threatening Behavior, but both are major misconducts. (Jt. App. 38, 98).

When asked at his deposition whether a different hearing officer may have reached a different result, the hearing officer stated: "More than likely, it could have been, yes. I'm sure that some Hearing Officers would have felt that this was threatening behavior." (Jt. App. 101). At his misconduct hearing Petitioner did not assert the retaliation claim that he now makes in this litigation, although he could have done so. The hearing officer's deposition makes it clear that Petitioner would have been free to raise a retaliation defense at the hearing. Evidence of retaliation would go to credibility. (Jt. App. 103).

As a consequence of his Insolence conviction, Petitioner received punishments affecting both the conditions and duration of his confinement. In addition to the 6 days of detention already served, he received seven days of detention,

[5] Interestingly, Petitioner's complaints borrow some of the language that had been used in the misconduct ticket against him, including Petitioner's claim that it was Respondent who had "his face contorted" and who was "staring angerly [sic]" at Petitioner. (Complaint, ¶ 3; Jt. App. 67). Petitioner even misspells "angerly" the same as in the misconduct ticket.

30 days loss of privileges, and loss of good time credits, which would have reduced his sentence.[6]

Michigan offers a review process for prisoners who wish to contest the result of a major misconduct hearing. M.C.L. 791.254-791.255. A prisoner may seek a rehearing within 30 days after receiving a copy of the hearing report. (P.D. 03.03.105 ¶ EE; Jt. App. 33). If the prisoner's request for rehearing is denied or if the prisoner is not satisfied with the result, then a prisoner may appeal to Michigan circuit court, which is the general trial court.[7] *Id.* at ¶ HH; Jt. App. 34. An appeal to circuit court is in the form of a Petition for Judicial Review. Although no further appeals are available as of right, the prisoner may file applications for leave to appeal in the Michigan Court of Appeals and the Michigan Supreme Court.

[6] In Michigan, good time credits are awarded monthly while a sentence is being served, M.C.L. 800.33, but "a prisoner shall not earn good time under this section during any month in which the prisoner is found guilty of having committed a major misconduct." M.C.L. 800.33(6). This statutory mandate is implemented by administrative rules, Michigan Administrative Code, R 791.5501(4) and a Department of Corrections Policy Directive, PD 03.03.105, ¶JJ; Jt. App. 35:

> A prisoner shall automatically not earn the disciplinary credits or good time which would have been earned during any month in which s/he commits a major misconduct violation which subsequently results in a finding of guilty.

Petitioner did not forfeit any previously-accumulated good time, but he lost the statutory additional days of good time that he would have accumulated during the month in which he was found guilty of the misconduct.

[7] Michigan's Prisoner Hearings Act, M.C.L. 791.255, requires a prisoner to exhaust administrative remedies (i.e., seek a rehearing) before seeking judicial review and requires that a petition for review be filed within 60 days after delivery or mailing of the Michigan Department of Corrections' final decision. There is no requirement that a prisoner still be in detention in order to challenge the misconduct conviction.

Petitioner Muhammad made no attempt to get his misconduct conviction overturned. Petitioner declined to seek a rehearing or judicial review. When asked why not, Petitioner stated: "Because I have done rehearings and judicial review of major misconducts, maybe ten, twelve tickets. And I'm convinced that that whole system don't work." (Muhammad Deposition, pp. 28-29; Jt. App. 92).

Petitioner filed his original complaint (Jt. App. 62) seeking money damages and seeking to have the misconduct charge expunged from his file because he claimed that Respondent "framed" him and "used the prison disciplinary process to retaliate." Petitioner also claimed that he sustained "43 days of unjust loss of liberty." (Jt. App. 68-69). Respondent filed a motion to dismiss and/or for summary judgment. The magistrate judge recommended denying the motion, concluding, among other things, that the favorable termination requirement of *Heck v. Humphrey*, 512 U.S. 477 (1994) did not apply. (Brief Opp. Pet., App. 1a). The district court adopted the report and recommendation. (Brief Opp. Pet., App. 36a).

Petitioner Muhammad then filed an amended complaint in which he reduced his claim of loss of liberty to six days, increased the amount of his money damages claim, and abandoned his request to have the misconduct charge expunged. (Jt. App. 70-73). On October 19, 1999, the magistrate judge appointed *pro bono* counsel for Petitioner. Significant discovery then proceeded, which focused primarily on the merits of Petitioner's retaliation claim. Respondent filed a motion to dismiss based on failure to exhaust administrative remedies as required by the Prison Litigation Reform Act. The magistrate judge recommended denying the motion. (R.68). The district court adopted the report and recommendation. (R.71).

After discovery closed, Respondent Close filed a second motion for summary judgment. The magistrate judge recommended granting Respondent's motion for summary judgment. (Brief Opp. Pet., App. 47a). The district court adopted the report and recommendation. (Brief Opp. Pet., App. 65a). The district court's ruling was based exclusively on Petitioner's failure to present sufficient evidence in support of his retaliation claim.

On appeal, Petitioner argued that the district erred when it decided that he failed to set forth sufficient evidence in support of the causation element of his retaliation claim. Petitioner argued that there were disputed issues of material fact that should have precluded summary judgment. Respondent argued that the determination of insufficient evidence was correct and also presented alternative arguments supporting the judgment: that Petitioner failed to establish all of the elements of a retaliation claim, that Petitioner's claim implies the invalidity of his underlying major misconduct violation and is subject to the favorable termination requirement, and that Officer Close was entitled to qualified immunity.

The Court of Appeals affirmed the district court's judgment, but on different grounds. Although the basis for the district court's decision was that Petitioner failed to offer sufficient evidence to defeat summary judgment, the Court of Appeals referred to Petitioner's original complaint and affirmed on the basis that *Heck v. Humphrey* barred Petitioner's claim because he requested that the misconduct charge be expunged from his file. (Brief Opp. Pet., App. 72a-73a). Petitioner filed a petition for rehearing in the Court of Appeals, which was denied in an unpublished order on November 14, 2002. (Brief Opp. Pet., App. 74a). Petitioner then filed a petition for a writ of certiorari. On June 16, 2003, this Court granted certiorari, limited to two issues.

SUMMARY OF THE ARGUMENT

1. The Court granted certiorari in the present case on two specified issues in order to examine whether the favorable termination requirement of *Heck v. Humphrey*, 512 U.S. 477 (1994) applies to inmates challenging *only* the conditions imposed as a result of a misconduct proceeding, and not the fact or duration of confinement. Petitioner Muhammad, however, received a punishment for prison misconduct (loss of good time credits) that affected the duration as well as the conditions of his confinement (punitive detention and loss of privileges). He could have pursued administrative and State court remedies under available Michigan procedures, and he could have pursued federal habeas corpus, but he did neither. Instead he brought a 42 U.S.C. § 1983 action alleging improper motivation in bringing the misconduct charge. The nature of that claim necessarily calls into question the authority of prison officials to punish him at all, and therefore necessarily implies the invalidity of his misconduct proceeding.

Because Petitioner's punishment affects the duration of his confinement and because the nature of his § 1983 claim necessarily implies the invalidity of the misconduct proceedings, this cases falls squarely within the favorable termination requirement of *Heck* and *Edwards v. Balisok*, 520 U.S. 641 (1997). The judgment of the Court of Appeals affirming summary judgment for Respondent should be upheld without reaching the questions on which this Court granted certiorari.

2. Even where a prison misconduct punishment does not affect the duration of confinement, the favorable termination requirement of *Heck* applies to a § 1983 action that necessarily implies the invalidity of prison misconduct hearing proceedings, regardless of the punishment imposed. The requirement is a condition precedent to maintaining such a § 1983 action because of the nature of the cause of action and

consideration of other appropriate statutes and weighty policies. When the misconduct punishment affects the duration of confinement, the most appropriate consideration is the availability of the federal habeas corpus statutes. When the punishment involves only the conditions of confinement, other appropriate considerations include the limited nature of limitations on the constitutional rights of prison inmates; concerns for prison management and deference to prison officials, particularly in the volatile context of misconduct proceedings; analogies to similar common law tort actions; the protections afforded to inmates in misconduct proceedings; and the availability of administrative and State law remedies. Because a civil § 1983 action challenging a prison misconduct proceeding is essentially a collateral attack on the determination of guilt, significant concerns for consistency and finality are also present.

In the present case Petitioner Muhammad's asserts, in effect, that Respondent Close committed the constitutional violation of choosing the wrong misconduct charge for activity that Petitioner now concedes violated prison rules. His current claims necessarily challenge the validity of his misconduct proceedings in which his rights were fully protected by the procedures articulated in *Wolff v. McDonnell*, 418 U.S. 539, 563-572 (1974). He could have pursued administrative review and review by the State Courts under available Michigan procedures, but he chose not to. He could have challenged his deprivation of good time credits in federal habeas corpus, but he chose not to. Instead he seeks money damages in a Civil Rights Act lawsuit that has consumed extensive resources by State officials and the federal courts. This case required more than 3 ½ years of litigation in the District Court with extensive discovery and three lengthy reports by the Magistrate Judge and opinions by the District Judge before finally concluding that there was no merit to the claims; another year in the Court of Appeals; and has now reached the highest court in the land. All this because an inmate asserts that a prison guard had a

grudge against him and he received six days in detention, a claim that does not even rise to the level of a constitutionally protected liberty interest, *Sandin v. Connor,* 515 U.S. 472 (1995).

The lofty purposes of the Civil Rights Act should not be trivialized in this manner. Applying the favorable termination requirement to these proceedings is fully consistent with the purposes of § 1983, when considered in light of the weighty policies involved in prison misconduct proceedings.

3. The favorable termination requirement is based upon the purposes of § 1983 viewed in the context of other statutes such as 28 U.S.C. § 2254, and weighty policies like the limitations on the types of constitutional litigation available to prison inmates, the nature of prison misconduct proceedings, the procedural protections available in such proceedings and the type of review available. Where the inmate's challenge to a prison misconduct proceeding necessarily implies the invalidity of the proceeding, the favorable termination requirement applies, regardless of the nature of the punishment imposed and regardless of the inmate's status at the time he seeks to assert his claim. The administrative review and State court judicial review that Michigan provides are available regardless of whether the inmate is still in punitive detention when review is sought. Because punishment is often only temporary, review does not depend on whether the inmate is current serving the punishment.

ARGUMENT

When a prisoner seeks to challenge the conditions of his confinement in an action under 42 U.S.C. § 1983, there are three possible scenarios. First, the challenge (such as a claim concerning medical care or the severity of a punishment) may not necessarily imply the invalidity of misconduct proceedings. If so, the favorable termination requirement *of Heck v. Humphrey*, 512 U.S. 477 (1994) and its progeny is simply not at issue and a § 1983 action may be available. That is not the situation in the present case, where the punishment imposed was imposed as a result of a misconduct proceeding and the challenge necessarily implies the invalidity of that proceeding. Second, with respect to punishment imposed at a misconduct proceeding that affects the duration of confinement (such as a loss of good time credits), a federal habeas corpus remedy may be available. A challenge that necessarily implies the invalidity of such a misconduct proceeding is subject to the favorable termination requirement. That was the situation in *Edwards v. Balisok*, 520 U.S. 641 (1997) and is also the situation in the present case. For the reasons explained in Argument I, Respondent submits that this case is indistinguishable from *Edwards* and the favorable termination requirement applies.

The third scenario, and apparently the one contemplated by the questions on which certiorari was granted, is punishment that affects only the conditions of confinement (such as punitive detention) and not the duration of confinement, so that federal habeas corpus relief is not available. For the reasons explained in Arguments II and III, Respondents submit that a § 1983 challenge that necessarily implies the invalidity of such a misconduct proceeding is also subject to the favorable termination requirement.

I. Petitioner's § 1983 Claim Necessarily Implies The Invalidity Of His Prison Misconduct Proceedings And His Punishment Involves The Duration Of His Confinement, So The Favorable Termination Requirement Applies.

A. The Favorable Termination Requirement Applies When A § 1983 Claim Necessarily Implies The Invalidity Of Prison Misconduct Proceedings That Resulted In Punishment Affecting The Duration Of Confinement.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), an inmate brought a 42 U.S.C. § 1983 lawsuit seeking money damages against a state prosecutor and investigator, alleging that they had engaged in an unlawful investigation, had destroyed exculpatory evidence, and had caused unlawful evidence to be used at his trial. This Court discussed the principle enunciated in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), that even though a claim may come within the literal terms of § 1983, "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release" and applied it to a claim for money damages. 512 U.S. at 481. The Court said that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. at 487. This has become known as the "favorable termination requirement," 512 U.S. at 486-87:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

The majority opinion relied heavily on an analogy to the common law tort of malicious prosecution, but the concurring opinion of Justice Souter and three other Justices rejected that heavy reliance and would instead have based the decision on different grounds, largely because of concern that individuals who could not bring a federal habeas corpus action might be deprived of any federal forum. 512 U.S. at 500.

The favorable termination requirement was made applicable to prison disciplinary proceedings in *Edwards v. Balisok*, 520 U.S. 641 (1997) where a prisoner challenged the procedures used at a disciplinary proceeding at which he was found guilty and received punishment of disciplinary confinement and loss of good time. Even though the prisoner's amended complaint specifically left out any request for the restoration of lost good time credits, this Court examined "the nature of the challenge to the procedures," 520 U.S. at 645, and concluded that "[t]he principal procedural defect complained of by respondent would, if established, necessarily imply the invalidity of the deprivation of his good-time credits." 520 U.S. at 646. The Court therefore held that the prisoner's "claim for declaratory relief and money damages, based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983." 520 U.S. at 648.

In *Spencer v. Kemna*, 523 U.S. 1 (1998) this Court considered another aspect of the favorable termination requirement. The Court held that a habeas corpus petition challenging a parole revocation became moot when the petitioner completed the entire term of imprisonment underlying the parole revocation. In reaching that decision the Court considered petitioner's argument that his petition was not moot, in part because he was foreclosed from bringing a 42 U.S.C. § 1983 money damage action challenging the revocation by the favorable termination requirement of *Heck*. In an opinion joined by eight Justices the Court rejected that argument for two reasons. First, because petitioner's argument "is a great *non sequitur*, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available." 523 U.S. at 17. Second, because it is not certain that a § 1983 damages claim would be foreclosed: "If, for example, petitioner were to seek damages for using the wrong procedures, not for reaching the wrong result, . . . and if that procedural defect did not necessarily imply the invalidity of the revocation, then *Heck* would have no application all." 523 U.S. at 17 (citation and internal quotation marks omitted).

A concurring opinion by Justice Souter, joined by three other Justices, said that *Heck* did not bar such a § 1983 claim since an individual who was not "in custody" and therefore could not bring a habeas corpus action nevertheless "may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." 523 U.S. at 21 (opinion of Souter, J., concurring). Justice Stevens was the sole dissent in *Spencer*, but his opinion indicated that he agreed with Justice Souter's analysis of *Heck*. 523 U.S. at 25, n 7. Justice Ginsberg, who had been in the majority in *Heck*, wrote a concurring opinion in *Spencer* indicating that she now believed that Justice Souter's analysis, rather than the *Heck* majority's analysis, was correct. 523 U.S. at 21-22.

B. Petitioner's Misconduct Proceedings Resulted In Loss Of Good Time Credits That Affected The Duration Of His Confinement.

The varying majority, concurring, and dissenting opinions in *Heck*, *Edwards*, and *Spencer* generated confusion concerning the applicability of the favorable termination requirement. The Court granted certiorari in the present case on two specified issues in order to examine whether the favorable termination requirement applies to inmates challenging only the conditions imposed as a result of a misconduct proceeding, and not the fact or duration of confinement. Petitioner asserts that a judgment in his favor would not "necessarily imply the invalidity" of his misconduct determination. If he is correct the favorable termination requirement of *Heck* simply does not apply. He is not correct, however, because the nature of his challenge is such that it *does* necessarily imply the invalidity of the misconduct determination, and the fact remains that his punishment included a loss of good time credits that affect the duration of his confinement. Because he is challenging the duration of his confinement, and his challenge implies the invalidity of the misconduct proceeding, this case is indistinguishable from *Edwards* and the same result should obtain. See Respondent's brief in opposition to the petition for certiorari, p. 7.

Petitioner Muhammad's amended complaint does not explicitly seek restoration of lost good time credits, and it does not explicitly seek removal of the misconduct from his record. In an effort to avoid the favorable termination requirement, he even goes so far now as to admit his guilt of the offense (Insolence) for which he was found guilty and assert that he is challenging only the loss of liberty for the six days of detention while awaiting his hearing. Pet. Brief at 42. While that is his current litigation posture, he did not take that position in the hearing itself. He entered a plea of "not guilty" to the charge

of Threatening Behavior (Major Misconduct Report, Jt. App. 57) and his conviction of the lesser included offense of Insolence was based on the facts, not on a guilty plea or plea bargain. In recommending denial of Respondent's first motion to dismiss, the Magistrate Judge appears to have accepted Petitioner's characterization and concluded that *Heck* was "inapplicable." (Report and Recommendation, Brief Opp. Pet., App. 23a-28a, 32a.) If Petitioner is correct that his claim does not "necessarily imply the invalidity" of his misconduct determination, then the favorable termination requirement of *Heck* does not apply, and the questions posed by this Court are not relevant. Summary judgment on the merits was appropriate and should be upheld.

Petitioner's characterization of the circumstances is not correct however. He would have this Court view the six days of pre-hearing detention as though it is completely unrelated to the underlying misconduct charge and hearing determination. It cannot be viewed in such artificial isolation, however. The challenge to the pre-hearing detention is not a free-standing attack on prison conditions generally; the detention would not have occurred but for the attendant misconduct proceedings and it cannot be divorced from them. This lawsuit is, in effect, a collateral attack on his misconduct conviction. The six days of pre-hearing detention was part of the sentence imposed by the Insolence conviction. Michigan hearing officers are permitted to give credit for time spent in segregation pending hearing. (Jt. App. 31, ¶ Y). Petitioner was sentenced to seven days of detention *in addition* to the six that he had already served. (Jt. App. 58). Thus, Petitioner's sentence as the result of his Insolence conviction was really thirteen days of total detention, loss of privileges, and loss of good time credits

C. Petitioner Is Subject To The Favorable Termination Requirement Because His § 1983 Claim Necessarily Implies The Invalidity Of His Misconduct Proceeding That Resulted In Punishment Affecting The Duration Of His Sentence

Respondent has never contended that the favorable termination requirement applies to challenges to prison conditions generally, and does not make that contention now. But the requirement does apply to challenges implying the invalidity of misconduct determinations that affect the duration of confinement, *Edwards, supra*, 520 U.S. 641, and that is the situation here. The essence of his claim is that Respondent had an unlawful motive--retaliation--in charging him with *any* offense. If he is correct, he should have suffered no detention, no loss of privileges, and no loss of good time credits. As with the allegations of misconduct by the prosecutor and investigator in *Heck*, and the allegations of deceit and bias on the part of the decisionmaker in *Edwards*, "[t]he . . . defect complained of by [Petitioner] would, if established, necessarily imply the invalidity of the deprivation of his good-time credits." 520 U.S. at 646.

Petitioner Muhammad, like the inmate in *Edwards*, received a punishment of disciplinary confinement *and* loss of good time, see p. 5-6, and "the nature of [his] challenge" involves the duration of his confinement and "necessarily [implies] the invalidity of the judgment." *Edwards*, 520 U.S. at 645. The present case is indistinguishable from *Edwards* and the same result should be imposed.

Petitioner could have filed an administrative and state-court appeal from his misconduct decision, but he chose not to. Similarly, he could have filed a habeas corpus petition challenging the deprivation of his good time credits since that punishment affected the duration of his confinement, but he did

not. In *Wolff v. McDonnell*, 418 U.S. 539, 547 (1974) this Court described two kinds of misconduct punishments: "The first is the forfeiture or *withholding of good-time credits, which affects the term of confinement*, while the second, confinement in a disciplinary cell, involves alteration of the conditions of confinement." (Emphasis added.) *Wolff* relied on *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973), and held that because inmates who sought restoration of good time credits were "challenging the very fact or duration of their confinement and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus." 418 U.S. 554. See also, *Superintendent, Massachusetts Correctional Institution v. Hill*, 472 U.S. 445, 454 (1985)("Where a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of imprisonment.").

Because a federal remedy was available to Petitioner, under the majority and concurring opinions in *Heck*, *Edwards*, and *Spencer*, Petitioner was subject to the favorable termination requirement, regardless of whether the requirement would apply to an inmate who does not have a remedy in federal court. Therefore the judgment of the Court of Appeals affirming summary judgment in Respondent's favor should be upheld.

II. The Favorable Termination Requirement Is A Condition Precedent To Maintaining A 42 U.S.C. § 1983 Action That Necessarily Implies The Invalidity Of A Prison Misconduct Proceeding, Regardless Of The Punishment Imposed.

The favorable termination requirement applies to § 1983 challenges that necessarily imply the invalidity of prison misconduct proceedings that result in punishment that affects the duration of confinement, because of the nature of the cause of action and because of the availability of federal court relief under another federal statute. *Edwards, supra*. The favorable termination requirement should also apply in such challenges even when the punishment does not affect the duration of confinement. This is because of the nature of the cause of action and because even if another statutory federal court remedy is not available, weighty policies are involved in the context of prison misconduct proceedings that militate against permitting such a challenge in a § 1983 action.

A. The Ostensible Scope Of § 1983 Is Limited By Other Statutes And Weighty Policies.

On its face, 42 U.S.C. § 1983 is very broad, applying to "every person" acting under color of State law who subjects another to "the deprivation of any rights" secured by the Constitution and laws. It is indisputable, as Petitioner asserts at p. 16 of his brief, that the purpose of § 1983 was "to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law . . . ." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Such broad statements of purpose, however, are not helpful in determining whether particular actions are within its scope.

Section 1983 only provides a remedy and does not itself create any substantive rights, *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617-618 (1979). Decades of this Court's jurisprudence demonstrate significant limitations on its ostensible scope. This Court has rejected the argument that a remedy is available under § 1983 to right all wrongs. *Spencer, supra,* 523 U.S. 1, 17 (1998)("This is a great *non sequitur*, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available."). The scope of § 1983 has been limited "for the sake of honoring some other statute or weighty policy." *Id.*, at 20 (1998)(Souter, J., concurring).

A clear example of a statute limiting the scope of § 1983, of course, as recognized in *Heck*, *Edwards*, and *Spencer*, is in the interplay between § 1983 and the habeas corpus statutes, 28 U.S.C. §§ 2241, 2254. For challenges to the fact or duration of confinement, the sole remedy is a writ of habeas corpus, even though a civil lawsuit under § 1983 would otherwise seem to be available. *Preiser v. Rodriguez*, 411 U.S. at 489 ("The broad language of § 1983, however, is not conclusive of the issue before us. The statute is a general one, and, despite the literal applicability of its terms, the question remains whether the specific federal habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation like this where it so clearly applies.") Similarly, although § 1983 contains no statute of limitations, policies of repose require the importation of such limits, *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)("A federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.' *Adams v. Woods,* 2 Cranch 336, 342 (1805).")

Examples of honoring "weighty policies" and not just specific statutes are shown in this Court's treatment of immunities. "Although the statute on its face admits of no

immunities, we have read it in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley v. Briggs*, 475 U.S. 335, 339 (1986). This Court has held that absolute immunity protects many public officials, and sometimes even private citizens, when performing a qualifying government function. *See, e.g., Pierson v. Ray*, 386 U.S. 547, 553-54 (1967)(judges)[8]; *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976)(prosecutors); *Tenney v. Brandhove*, 341 U.S. 367, 378-79 (1951)(legislators); *Nixon v. Fitzgerald*, 457 U.S. 731, 744-758 (1982)(President of the United States); and *Richardson v. McKnight*, 521 U.S. 399, 417 (1997)(grand jurors). And even when absolute immunity is not applicable, public officials will be entitled to qualified immunity when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The clear effect of this Court's jurisprudence is that the ostensible broad scope of § 1983 is limited by other statutes and weighty policies.

B. 42 U.S.C. § 1983 Only Permits Limited Causes Of Action In The Context Of Prisoners And Prison Misconduct Proceedings

Petitioner asserts, Brief, pp. 14-15, that there are only two exceptions to the § 1983 remedies "broadly available to prisoners": the need to harmonize federal habeas corpus and the exhaustion requirement of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). That broad statement, however, is contradicted by decades of this Court's

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[8] Michigan hearing officers are entitled to absolute immunity, since the relevant Michigan "statutory provisions indicate that the hearing officers are in fact professional hearing officers in the nature of administrative law judges." *Shelly v. Johnson*, 849 F.2d 228, 230 (6th Cir. 1988).

jurisprudence. As noted by Petitioner, this Court did not formally recognize that a prisoner could even state a claim under § 1983 until its decision in *Cooper v. Pate*, 378 U.S. 546 (1964). (Brief for Petitioner, p. 17). This Court has recognized that "[w]hen § 1983 was enacted, it is unlikely that Congress actually foresaw the wide diversity of claims that the new remedy would ultimately embrace." *Wilson*, *supra*, 471 U.S. at 275. But the wide diversity of claims is not without limit, particularly in the contexts of prisoners and prison misconduct proceedings.

Although "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner v. Safley*, 482 U.S. 78, 84 (1987), "imprisonment carries with it the circumscription or loss of many significant rights." *Hudson v. Palmer*, 468 U.S. 517, 524, 530 (1984)("prisoners have no legitimate expectation of privacy and . . . the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells"). "The curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, *Wolff v. McDonnell*, [418 U.S. 539, 555 (1974)], chief among which is internal security, see *Pell v. Procunier*, [417 U.S. 817, 823 (1974)]." *Id.*, 468 U.S. at 524. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights," *Pell*, 417 U.S. at 822 (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)). There can be no dispute that inmates retain many of the protections of the First Amendment, such as rights to free expression, *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989); to petition the government for the redress of grievances, *Johnson v. Avery*, 393 U.S. 483 (1969); and to free exercise of religion, *O'Lone*, 482 U.S. at 348. But even "[i]n the First Amendment context . . . some rights are simply inconsistent with the status of a prisoner," *Shaw v. Murphy*, 532 U.S. 223, 229 (2001), and a prisoner retains only those rights "that are not inconsistent with his status as a prisoner or with the

legitimate penological objectives of the corrections system." *Pell*, 417 U.S. at 822; *Turner*, 482 U.S. at 95.

Certain actions are not permitted under § 1983. Prisoners who allege medical malpractice will be without a federal remedy. "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Prisoners alleging simple battery will also be without federal remedy. "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). Rather, a prisoner alleging excessive force is required to show that the officer's actions were done "maliciously and sadistically for the very purpose of causing harm." *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986). Even a prisoner's right of access to the courts is strictly limited. Although prisoners have the right to file direct appeals from convictions, habeas petitions, and § 1983 actions, the right "does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims." *Lewis v. Casey*, 518 U.S. 343, 355 (1996). If a prisoner seeks to file a lawsuit that falls outside the narrow class of protected litigation, then he is without a federal remedy.

The scope of § 1983 has been limited in cases where a prisoner's constitutional rights conflict with prison management. This Court has long recognized a "policy of judicial restraint regarding prisoner complaints," *Procunier v. Martinez*, 416 U.S. 396, 406 (1974). Once a prisoner is lawfully convicted and incarcerated, prison officials are entitled to substantial deference in discharging their duties. "[C]ourts are ill equipped to deal with the increasingly urgent

problems of prison administration and reform," and "[w]here a state penal system is involved, federal courts have...additional reason to accord deference to the appropriate prison authorities." *Procunier*, 482 U.S. at 405. This Court has granted prison officials significant latitude in setting policy. In *Turner v. Safley*, 482 U.S. 78, 89 (1987), this Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." In other words, an impingement on a prisoner's constitutional rights will *not* be actionable if reasonably related to legitimate penological interests even though a similar action taken against a free citizen *may* be actionable. "We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton v. Bazzetta et al.*, 539 U.S. ___, 123 S.Ct. 2162, 2167 (2003)(upholding prison rules regarding visitation).

Two other decisions shed light on the nature of prison inmates' constitutional rights in the particular context of disciplinary proceedings and are relevant here. In *Wolff v. McDonnell, supra*, 418 U.S. at 557, the Court held that the Due Process Clause does not itself confer a liberty interest in good time credits, but where State law does so, and where State law provides that the credits may only be taken away for misconduct, there is a sufficient constitutional liberty interest at stake to require "those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." There is no allegation that the required procedures were not observed in the present case, but it is important to recall the considerations the Court noted, 418 U.S. at 556, that distinguish prison misconduct proceedings from criminal trials, since "prison disciplinary proceedings are not part of a

criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply."

> Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. . . . [I]n many [prisons] the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. . . .
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> It is against this background that disciplinary proceedings must be structured by prison authorities; and it is against this background that we must make our constitutional judgments . . . . The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority

In *Sandin v. Connor*, supra, 515 U.S. 472, this Court reiterated the limitations on the types of causes of action available to prison inmates when it considered the § 1983 money damages claim of an inmate who had been found guilty of a prison misconduct and had received punishment of punitive detention. The Court reexamined the circumstances in which a State might create a liberty interest, and rejected an earlier approach that "has led to the involvement of federal

courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." 515 U.S. at 482. Noting that "[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law," the Court concluded that misconduct detention, "though concededly punitive, does not present a dramatic departure from the basic conditions of [the inmate's] indeterminate sentence." 515 U.S. at 485. It held that "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." 515 U.S. at 486.

Thus it is apparent that only limited causes of action are cognizable under § 1983 in the context of prisoners and prison misconduct proceedings.

C. Analogy To The Common Law Is Appropriate In Determining Whether The Favorable Termination Requirement Applies To All § 1983 Claims That Necessarily Imply The Invalidity Of Prison Misconduct Proceedings

Petitioner Muhammad claims that "the favorable termination requirement emerges solely from concerns about preserving the federal habeas corpus structure where Congress intended it to apply" and that the "single aim of the favorable termination requirement . . . is to square § 1983's expansive language with the specific exhaustion requirement of the federal habeas corpus statute in circumstances where the two clash." (Brief for Petitioner, pp. 15, 27). Just as Petitioner's view of the scope of § 1983 is too broad, his explanation of the rationale behind the favorable termination requirement is too narrow. Although *one* of the reasons for the favorable termination requirement was to avoid the collision of the habeas corpus statutes and § 1983, another basis for applying

the favorable termination requirement comes from the common law.

"Although a few § 1983 claims are based on statutory rights," *Wilson v. Garcia, supra*, 471 U.S. at 278, most involve allegations of constitutional violations, and in determining whether to permit a particular cause of action, it is appropriate to examine the common law. *Id.*, at 277 ("The atrocities that concerned Congress in 1871 plainly sounded in tort. Relying on this premise we have found tort analogies compelling in establishing the elements of a cause of action under § 1983."). Claims brought under § 1983 are therefore litigated against the background of common law. This Court has "repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability." *Memphis Community School District v. Stachura*, 477 U.S. 299, 305 (1986)(using common law to address damages in § 1983 actions).

In *Wilson*, 471 U.S. at 277, the Court was attentive to the need for national uniformity in determining the appropriate state law statute of limitations for § 1983 actions, but looked to common law analogies for the origins of the cause of action ("Among the potential analogies, Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract."). In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 715 (1999), this Court looked to the specific claim (a regulatory takings claim) when it concluded a jury trial was appropriate because the respondent's "cause of action sounds in tort and is most analogous to the various actions that lay at common law to recover damages for interference with property interests." The common law also provides guidance in developing the specific elements of individual claims brought under § 1983. This Court explained that it has "examined common-law doctrine when identifying both the

elements of the cause of action and the defenses available to state actors." *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997).

Although the civil law has been the usual source for guidance, the criminal law can also provide guidance when formulating a workable rule. In *Farmer v. Brennan*, 511 U.S. 825, 837 (1994), this Court rejected the civil law's objective standard for deliberate indifference in favor of a subjective standard, which was more in line with the criminal law's "subjective recklessness" standard. Whether criminal or civil, this Court has sought guidance from the common law when defining the elements of specific claims brought under § 1983.

Consistent with this Court's earlier cases, *Heck* served as yet another reminder that "42 U.S.C. § 1983 creates a species of tort liability." 512 U.S. at 483. The analogy to the common law of malicious prosecution, with its favorable termination requirement, formed the basis for this Court's holding in *Heck*. Even Justice Souter's concurring opinion in *Heck* recognized that analogy to the common law is appropriate in certain circumstances. There, he felt it was necessary to "avoid collisions at the intersection of habeas and § 1983," 512 U.S. at 498. Similarly, resort to the common law is appropriate here to avoid collisions at the intersection of § 1983 and the weighty policies of "judicial restraint regarding prisoner complaints," *Procunier*, *supra*, 416 U.S. at 406.

D. The Favorable Termination Requirement Applies To All § 1983 Claims That Necessarily Imply The Invalidity Of Prison Misconduct Proceedings Regardless Of The Punishment Imposed.

The rationale for the favorable termination requirement in malicious prosecution actions is to prevent a collateral attack on the conviction itself, in order to "avoid[] parallel litigation over the issues of probable cause and guilt," to alleviate

"concerns for finality and consistency," to advance the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction," and to promote "finality and consistency." *Heck*, 512 U.S. at 484-85. Even though prison misconduct proceedings differ in many respects from criminal trials, they are entitled to respect and deference and the same concerns of finality apply.

This case, like *Heck*, most resembles malicious prosecution. Petitioner Muhammad's claim is that Respondent Close "framed" him and wrote a misconduct ticket in retaliation for filing prior lawsuits. The issue was whether Respondent intentionally committed the act of instigating a confrontation with Petitioner and then intentionally charged Petitioner with a more severe prison violation than warranted, all for the purpose of retaliating against Petitioner for exercising his First Amendment rights (filing meritless lawsuits).[9] This is essentially a malicious prosecution claim, with the motive being retaliation. Accordingly, Petitioner should be required to show that his misconduct conviction was set aside (whether or not habeas was available) before proceeding with his § 1983 action.

Respondent reiterates that he has never contended that the favorable termination requirement applies to challenges to prison conditions generally, and does not make that contention now. The favorable termination requirement applies where, as here, the prisoner's claim necessarily implies the invalidity of his misconduct proceedings. Such a rule would promote finality and prevent collateral attack. *Heck*, 512 U.S. at 484-85.

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[9] The issue of whether Petitioner was even engaged in First Amendment activity is uncertain, but that question is not before this Court. *See, e.g., Herron v. Harrison*, 203 F.3d 410, 415 (6th Cir. 2000)(concluding that filing lawsuits is "protected conduct only to the extent that the underlying claims had merit." This was based on the "actual injury" requirement announced by this Court in *Lewis v. Casey*, 518 U.S. 343 (1996)).

On the other hand, the favorable termination requirement does not apply to a prisoner whose challenge to the conditions of his confinement does not necessarily imply the invalidity of the misconduct proceeding. Challenges to the procedures used at misconduct proceedings, challenges to the nature or severity of punishment, and challenges to conditions unrelated to misconduct proceedings do not implicate the favorable termination requirement. See, *Spencer v. Kemna, supra*, 523 U.S. at 17; *Edwards v. Balisok, supra*, 520 U.S. at 649 (Ginsberg, J., concurring). For example, if a prisoner was challenging a denial of medical care that occurred while he was confined to punitive detention, the claim would not be subject to the favorable termination requirement because it would not necessarily imply the invalidity of the misconduct proceeding. Similarly, if an inmate was handcuffed to a hitching post for committing an infraction, he could challenge this as a cruel and unusual punishment under the Eighth Amendment because the challenge would not be to the misconduct proceeding itself, but to the excessive nature of the punishment imposed. *Hope v. Pelzer*, 536 U.S. 730 (2002). See, *Whitley v. Albers*, 475 U.S. 312, 320-321 (1986) (a prisoner alleging excessive force is required to show that the actions were done "maliciously and sadistically for the very purpose of causing harm"). Thus, the favorable termination requirement would apply only to cases where the challenge necessarily implies the invalidity of the misconduct conviction itself, not just the particular punishment that was imposed.

Failure to apply the favorable termination requirement to all challenges that necessarily imply the invalidity of misconduct proceedings could have the inconsistent and illogical result that a prisoner punished with several years of administrative segregation could bring a § 1983 challenge, but a prisoner who loses only one day of good time credits could not. Success on the § 1983 action would imply the invalidity of the misconduct hearing in both scenarios and there is no

reason to treat them differently. Such different treatment of essentially similar situations might even lead corrections officials to uniformly apply loss of good time credits to even very minor infractions in order to take advantage of the favorable termination requirement.

E. Application Of The Favorable Termination Requirement To § 1983 Challenges That Necessarily Imply The Invalidity Of Prison Misconduct Proceedings Is Appropriate, Given The Procedural Protections Involved In Those Proceedings And The Availability Of Alternative Methods Of Review.

This Court addressed the procedural requirements for prison disciplinary hearings in *Wolff v. McDonnell*, *supra*, 418 U.S. at 563-572. Those protections were applied in Petitioner's hearing, and deference should be accorded to the result of the hearing. By removing the favorable termination requirement from discipline hearings that do not result in a loss of good time, prisoners will be permitted--perhaps even encouraged--to collaterally attack these hearings through § 1983 actions, resulting in an erosion of the traditional deference accorded to prison officials by the federal courts.

Michigan provides ample methods for inmates to challenge prison misconduct proceedings. M.C.L. 791.254-791.255. In addition to federal habeas corpus, an administrative appeal and judicial review in the State courts were available to Petitioner, although he chose not to seek any review. Even if a misconduct punishment does not include loss of good time credits so that federal habeas review would not be possible, Michigan's procedures give inmates the opportunity for review and favorable termination of their misconduct determinations. This is not a situation where satisfying a favorable-termination requirement "would be

impossible as a matter of law," *Spencer v Kemna, supra*, 523 U.S. at 21 (Souter, J., concurring)

F. The Favorable Termination Requirement Is Not Subsumed By The Exhaustion Requirement Of The Prison Litigation Reform Act.

Petitioner argues that the exhaustion requirement for prison conditions cases in the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), demonstrates that Congress did not intend a favorable termination requirement to apply to such cases. (Brief for Petitioner, p. 32). This argument is wrong as a matter of statutory construction and is completely beside the point.

The PLRA's exhaustion requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002). A prisoner seeking only money damages is required to exhaust his administrative remedies even if the relief offered by the administrative process does not include money damages. *Booth v. Churner*, 532 U.S. 731, 734 (2001).

This broad PLRA requirement that no § 1983 action shall be brought until administrative remedies are exhausted simply has no relevance to the question of whether a particular claim is subject to a threshold favorable termination requirement. When it enacted the PLRA, Congress did not codify the individual elements required for specific claims. Section 1983 only provides a remedy and does not itself create any substantive rights, *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617-618 (1979), and the PLRA's exhaustion requirement is not triggered unless there is an underlying claim in the first place. Favorable termination is

necessary for a common law claim of malicious prosecution, which is the analog of the claim at issue in *Heck* and in the present case. In the context of a claim that necessarily implies the invalidity of a misconduct proceeding, a prisoner who fails to show favorable termination fails to state a claim upon which relief can be granted. just as a prisoner who fails to show deliberate indifference to serious medical needs fails to state an Eighth Amendment medical claim. In fact, 42 U.S.C. § 1997e(c)(2) permits courts to skip over the exhaustion analysis when there is a failure to state a claim:

> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

The exhaustion requirement is independent from the favorable termination requirement. While exhaustion is a procedural requirement, favorable termination is a substantive requirement. True, Congress could have imposed a statutory favorable termination requirement, just as it could have statutorily defined immunity defenses and a statute of limitations. Its failure to do so, however, has no impact on this Court's jurisprudence that evaluates such concerns in defining the various § 1983 causes of action.

Favorable termination is a required element for claims that necessarily imply the invalidity of misconduct proceedings. Consequently, the PLRA's exhaustion requirement has no bearing on the favorable termination requirement, neither of which were satisfied by Petitioner. [10]

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[10] Respondent maintains that the district court erred when it denied his motion to dismiss for failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a). Because Respondent ultimately prevailed on other

III. An Inmate Whose § 1983 Claim Necessarily Implies The Invalidity Of Prison Misconduct Proceedings Must Satisfy The Favorable Termination Requirement Even If He Is No Longer Confined To Administrative Segregation.

The favorable termination requirement is based upon the nature of the claim, not the type of punishment or the inmate's status at the time of bringing the claim. The rationale for the requirement is based upon the purposes of § 1983 viewed in the context of other statutes like 28 U.S.C. § 2254, and weighty policies like finality, consistency, the limitations on the types of constitutional litigation available to prison inmates, the nature of prison misconduct proceedings, the procedural protections available in such proceedings, and the type of review available. If the nature of a § 1983 claim is such that it necessarily implies the invalidity of the misconduct proceeding, the favorable termination requirement applies, whether the challenge is to the duration of confinement (loss of good time credits) or the conditions of confinement (punitive detention and loss of privileges). A prisoner challenging the validity of a misconduct proceeding that resulted in punishment affecting only the conditions of confinement is subject to the favorable termination requirement even if he is no longer subject to the conditions at the time he brings his § 1983 action.

The question of the inmate's status at the time of the challenge applies to the requirement of the federal habeas corpus requirement, 28 U.S.C. § 2241(c), that a prisoner be "in custody." A prisoner who has lost good time credits will be "in custody" for habeas corpus purposes until they are restored, regardless of whether he is in administrative segregation. A prisoner who is challenging only a sentence of administrative segregation is not "in custody" for habeas corpus purposes

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grounds, however, Respondent did not challenge the decision. Consequently, the issue is not before this Court.

since he is not challenging the fact or duration of his confinement. *Preiser, supra*; *Wolff, supra*. The question of custody is irrelevant to the question of whether the § 1983 claim necessarily implies the invalidity of the misconduct proceeding. "We think the principle barring collateral attacks--a longstanding and deeply rooted feature of both the common law and our own jurisprudence--is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Heck*, 512 U.S. at 490 fn. 10.

The assumption underlying this question is that review of the misconduct violation would no longer be available upon the prisoner's release from administrative segregation. That is not the situation in Michigan, however. Punishment imposed at misconduct proceedings that affects conditions of confinement is typically temporary, and while the Michigan statute, administrative rule, and policy directive that control review of such proceedings have time limits, review does not depend on whether the inmate is still subject to the punishment when he seeks review.

If a Michigan prisoner disagrees with the result of a disciplinary hearing, he has 30 days to submit a request for a rehearing. (M.C.L. 791.254(3); P.D. 03.03.105 ¶ EE; Jt. App. 33). If the request for a rehearing is denied or the prisoner is not satisfied with the result, he can appeal to Michigan circuit court. (M.C.L. 791.255; P.D. 03.03.105 ¶ HH; Jt. App. 34). That appeal, which is in the form of a petition for judicial review, is then decided by a circuit court judge, who "may affirm, reverse or modify the decision or order or remand the case for further proceedings." M.C.L. 791.255(5). A prisoner has up to 60 days after the final administrative decision to file a petition for judicial review. M.C.L. 791.255(2). Importantly, both the administrative appeal and the petition for judicial review remain available even if a prisoner is released from administrative segregation.

Petitioner Muhammad's release from administrative segregation did not moot or otherwise preclude him from having his misconduct conviction reviewed. [11] The fact that Petitioner's misconduct conviction was not reviewed was due to Petitioner's voluntary choice not to seek review. Petitioner's lack of faith in the system does not excuse his failure to initiate proceedings that could have overturned his misconduct conviction.

The fact that the Petitioner did not seek to overturn his misconduct conviction through available remedies does not warrant a waiver of the favorable termination requirement in this case.

CONCLUSION

Because Petitioner's § 1983 claim necessarily implies the invalidity of his prison misconduct proceeding, and because the punishment he received in that proceeding affects the duration of his confinement, his action falls squarely within this Court's decisions in *Heck* and *Edwards*, and the favorable termination requirement applies to his claim.

Alternatively, Respondent submits that the favorable termination requirement applies to all § 1983 claims that necessarily imply the invalidity of prison misconduct proceedings, even those that affect only the conditions, and not the duration, of confinement. Application of the favorable termination requirement in such circumstances is faithful to the purposes of § 1983 and is consistent with this Court's

[11] Although Petitioner Muhammad could have sought review after he was released from administrative segregation back in 1997, review is now foreclosed because Petitioner did not seek review within the time limitations. But the issue of whether the statute of limitations or other time restrictions foreclose review is distinct from the issue of whether a prisoner's release from administrative segregation, by itself, forecloses review (which it does not).

jurisprudence since it recognizes legitimate and weighty policies like finality, consistency, the limitations on the types of constitutional litigation available to prison inmates, the nature of prison misconduct proceedings, the procedural protections available in such proceedings, and the type of review available.

Respondents request this Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

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In The

Supreme Court of the United States

SHAKUR MUHAMMAD, aka John E. Mease,

Petitioner,

v.

MARK CLOSE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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INTRODUCTION AND SUMMARY

Resisting the questions this Court crafted in this case, Respondent devotes much of his brief to raising new issues that he never disputed in the lower courts, recycling old issues that were ruled upon and then abandoned below,[1] and heralding irrelevant and contested details – some without citation to record material[2] – that malign Petitioner personally or lawsuit-filing prisoners generally. The most striking aspect of Respondent's focus is his contention that, contrary to the premise inherent in the first question presented in this case, Petitioner's § 1983 suit *is* a fact-or-duration case because under state law, Petitioner's major misconduct violation resulted in the loss of good-time credits for the month in which he was found guilty of that violation. Respondent says nothing about his failure to object to or appeal the lower courts' assumption that "there has been no deprivation of good-time credits" in this case. *See* Brief in Opposition 27a. Waiver aside, Respondent is factually wrong on this point because under Michigan law, "a defendant [such as Petitioner] sentenced as an habitual offender is not entitled to disciplinary credits." *People v. Carson*, 560 N.W.2d 657, 674 (Mich. Ct. App. 1997).

Once Respondent turns to the merits of the questions this Court granted certiorari to consider, he advocates a strictly policy-based test that is untethered to the language of 42 U.S.C. § 1983, its history, or any need to

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[1] This includes several references to Petitioner's failure to exhaust his administrative remedies, though Respondent raised and lost that issue in the district court. Respondent also questions "whether Petitioner was even engaged in First Amendment activity," while admitting that "that question is not before this Court." Brief for Respondent at 31 n.9.

[2] *See, e.g.*, Brief for Respondent at 3 n.2

reconcile that statutory scheme with conflicting legislation, and that Respondent cannot justify by the common law analogy that was a useful structural guide in *Heck v. Humphrey,* 512 U.S. 477 (1994). In an attempt to stem § 1983 prisoner suits through a baseless extension of the favorable termination requirement, Respondent mistakes this Court's decisions defining the limited substantive constitutional rights of prisoners for restrictions on the legal remedies available to prisoners whose rights, however limited, have been infringed. Respondent's approach would require this Court to flout the conceptual statutory basis for identifying a favorable termination requirement in the first place, to preclude from federal review a class of § 1983 claims that go to the core of what Congress intended to remedy when it enacted the Civil Rights Act of 1871, and to dispense with the clarity of the rule in *Preiser v. Rodriguez,* 411 U.S. 475 (1978).

I. THIS IS NOT A FACT-OR-DURATION CASE AS MICHIGAN LAW REQUIRES PETITIONER TO SERVE HIS MINIMUM SENTENCE UNALTERED BY GOOD-TIME CREDITS AND AS RESPONDENT IN ANY EVENT HAS WAIVED THIS ARGUMENT.

Respondent's first and principal argument is that Petitioner was required to favorably terminate his claim before he could pursue his § 1983 action because Petitioner's misconduct proceedings resulted in a loss of good-time credits that affected the duration of his confinement. Respondent is factually wrong. Petitioner was sentenced as a habitual offender.[3] Under Michigan law, a defendant

[3] *Michigan v. Mease,* No. 137212, slip op. at 1 (Mich. Ct. App. March 14, 1994) (noting Petitioner's habitual offender status and affirming his convictions on direct appeal). In light of Respondent's new

(Continued on following page)

who was sentenced as a habitual offender must serve his minimum sentence without any reduction of that minimum based upon good-time or disciplinary credits.[4] Success in his civil rights action, therefore, would not shorten Petitioner's

argument regarding good-time credits, Petitioner has filed a request pursuant to Rule 32 to lodge with this Court a copy of the Michigan appellate court's order as well as the following judicially noticeable documents confirming Petitioner's status as a habitual offender: (1) the felony information charging Petitioner as a habitual offender; (2) a docket entry noting that the proceedings on the habitual offender charge would be subsequently held; (3) the judgment of sentence indicating Petitioner's conviction of being a habitual offender; and (4) an excerpt from Petitioner's sentencing transcript in which the judge who imposed sentence noted that Petitioner was a habitual offender who would receive no good-time or disciplinary credits.

[4] Mich. Comp. Laws § 769.12(3) (West Supp. 1990) (habitual offender "shall not be eligible for parole before the expiration of the minimum term fixed by the sentencing judge at the time of sentence without the written approval of the sentencing judge or a successor"); *People v. Carson,* 560 N.W.2d at 674 ("a defendant sentenced as an habitual offender is not entitled to disciplinary credits"); *People v. Martinez,* 532 N.W.2d 863, 865 (Mich. Ct. App. 1995) (habitual offenders "may not earn disciplinary credits" because they "are not eligible for parole before the expiration of the minimum sentence except by written permission of the sentencing judge or the judge's successor"); *People v. Lincoln,* 423 N.W.2d 216, 216 (Mich. Ct. App. 1987) ("To allow disciplinary credits to an habitual offender would defeat the purpose of the [habitual offender statute]."); *Manuel v. Department of Corrections,* 364 N.W.2d 334, 335 (Mich. Ct. App. 1985) ("habitual offenders do not accrue good-time credits, regular or special"); *People v. Owens,* 310 N.W.2d 819, 822 (Mich. Ct. App. 1981) (trial court did not err in failing to inform defendant that because he was a habitual offender his term would be "flat time" and "he would be ineligible for good time or special good time credit, under the [habitual offender] statute as interpreted by the courts"); *Lamb v. Bureau of Pardons and Paroles,* 307 N.W.2d 754, 758 (Mich. Ct. App. 1981) ("a defendant sentenced as a habitual offender may not be paroled prior to the calendar minimum sentence without the approval of the sentencing judge"); *White v. Kapture,* 2001 WL 902500 *6 (E.D. Mich. June 26, 2001) ("Michigan law does not permit habitual offenders to receive good time or disciplinary credits on their sentences").

sentence, and would certainly not "necessarily imply the invalidity of a previous loss of good-time credits." *Edwards v. Balisok,* 520 U.S. 641, 648 (1997). Although the Michigan Department of Corrections continues to calculate the credits that were formerly available, these credits cannot reduce a habitual offender's minimum sentence.[5]

Even if Respondent were correct that Petitioner was deprived of good-time credits, Respondent has waived this argument by failing to litigate it below and by acceding to Magistrate Judge Charles Binder's written finding that there was no loss of good-time credits. Respondent's failure to raise an obvious fact-based defense in the trial court amounts to an intentional relinquishment of any such claim. *See United States v. Olano,* 507 U.S. 725, 733 (1993); *see also Heck,* 512 U.S. at 480 n.2 (noting that Petitioner's argument that prevailing on his damages claims would not invalidate his conviction "comes too late" as Court "did not take this case to review such a fact-bound issue"). Respondent never argued in the district court or in the Sixth Circuit that Petitioner was required to comply with the favorable termination rule because his success in his § 1983 action would restore lost good-time credits. In the district court, Respondent argued, without any mention of good-time credits, that *Edwards v. Balisok* barred Petitioner's § 1983 claim because his claim implied the invalidity of the result of the misconduct hearing, Record 9 at 2-3,

[5] Under the current statutory provision, offenders sentenced for crimes committed after December 15, 2000 – and for certain specified crimes committed after December 15, 1998 – are not under any circumstances eligible for parole until the expiration of the minimum term fixed by the sentencing judge. Offenders such as Petitioner, who was sentenced for a crime committed in 1990, also are not eligible for parole until they have served the minimum term imposed by the sentencing judge, but unlike the later offenders, they are entitled to ask for earlier parole if they obtain the written approval of the sentencing judge or a successor of that judge. Mich. Comp. Laws § 769.12 (4).

suggesting, as he explicitly states now, that the claim is therefore not cognizable under § 1983 "regardless of the punishment imposed." Brief for Respondent at 21, 30. When the magistrate judge rejected Respondent's request to dismiss Petitioner's § 1983 action under *Edwards v. Balisok,* he assumed that "there has been no deprivation of good-time credits" – an assumption Respondent never contested. Respondent's written objections to the magistrate judge's report not only declined to challenge any aspect of the judge's rejection of his request to dismiss Petitioner's suit under *Edwards,* but implicitly agreed that good-time credits were not lost in this case when he noted that "[a]ll that Plaintiff received as a sanction for the misconduct was 7 days detention and 30 days loss of privileges." Record 18 at 6-7. This Court granted certiorari based on the facts as the lower courts understood them, and Respondent cannot now change those facts by asking this Court to engage in impermissible appellate factfinding, even if he had factual grounds or any support in the record for doing so.[6]

II. RESOLUTION OF THE QUESTIONS PRESENTED IN THIS CASE REQUIRES THIS COURT TO INTERPRET A STATUTE, NOT TO ADVANCE "WEIGHTY POLICIES."

Petitioner argued in his opening brief that the favorable termination requirement of *Heck v. Humphrey* does not apply to a § 1983 challenge to the conditions rather than the fact or duration of a prisoner's confinement

[6] Even if Petitioner were not sentenced as a habitual offender and Respondent had not waived this claim, Petitioner's § 1983 action still would not necessarily imply the invalidity of his sentence because the loss of good-time credits resulted only from the conviction for insolence, which is not the focus of this lawsuit. *See infra* Part III. Moreover, nothing in the record shows that prison administrators actually acted upon any requirement to disallow good-time credits.

because such a requirement does not appear in the statute, is inconsistent with its history, and is not needed to reconcile two conflicting statutes. Respondent counters that the favorable termination requirement of *Heck* applies to a § 1983 action that necessarily implies the invalidity *not* of the prisoner's conviction or sentence, but "of a prison misconduct proceeding,- *regardless of the punishment imposed*." Brief for Respondent at 10 (emphasis added). According to Respondent, this rule is compelled primarily by "weighty policies" such as "limitations on the types of constitutional litigation available to prison inmates," "judicial restraint regarding prisoner complaints," and "concerns for prison management and deference to prison officials, particularly in the volatile context of misconduct proceedings." Brief for Respondent at 11-12, 30.

Respondent does not claim to locate this requirement in the terms of § 1983 itself. Nor does he say that a collision between statutes makes favorable termination necessary. He instead supports his thesis with two basic contentions: first, that the favorable termination requirement for certain § 1983 conditions claims somehow materializes from the common law, and second, that it can also be gleaned from this Court's repeated willingness to identify limits to the rights of incarcerated people. Neither of these sources withstands examination, and any policy-based appeal of Respondent's approach cannot salvage a test that contradicts the language, the purpose, and the history of § 1983.

The Fallacy of the Common Law Analogy

The only specific source Respondent identifies for this broad-based favorable termination requirement in non-fact-or-duration cases is the common law. *See* Brief for Respondent at 28-29. This principal facet of Respondent's argument becomes its plainest liability.

Respondent does not say where in the common law he finds this deference to prison management. Though he suggests that the malicious prosecution analogy plays the same role in endorsing his expansion of the favorable termination requirement as it played in *Heck v. Humphrey, Heck* itself refutes this. This Court's reliance upon the analogy of malicious prosecution in *Heck* stemmed specifically from "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." 512 U.S. at 486. *Heck* recognized the problem with permitting civil litigants to attack judgments that resulted from an elaborate criminal process characterized by myriad procedural protections, a requirement of proof beyond a reasonable doubt, state court review, and the availability of federal habeas corpus review. The common law contains no similar concern, however, for the highly discretionary decisions of prison hearing officers. And that is true with or without the "ample methods" Michigan provides "for inmates to challenge prison misconduct proceedings," Brief for Respondent at 33 – methods that are by no means constitutionally required and that reveal nothing about the intent of Congress, which enacted a statute that applies to more and less beneficent states alike.

More fundamentally, the favorable termination requirement of *Heck v. Humphrey* specifically contemplates a federal forum under the federal habeas statute. Respondent admits that his form of favorable termination in cases that do not affect the fact or duration of confinement would deprive some inmates of any federal review. Brief for Respondent at 11-12, 19-20. Though he deems this fact mitigated by the state review procedures available in Michigan, such a draconian consequence "lacks any common-law pedigree and alters the cause of action itself in a way that undermines the very purpose of § 1983 – to provide a remedy for the violation of federal rights." *Crawford-El v. Britton,* 523 U.S. 574, 594-595 (1998)

(rejecting a reading of § 1983 that would require plaintiffs – in that case a prisoner – to prove an official's improper motive by clear and convincing evidence).

Respondent further argues that as in *Heck v. Humphrey,* application of the favorable termination requirement to § 1983 actions that necessarily imply the invalidity of an inmate's misconduct proceeding, even in cases not affecting the fact or duration of confinement, "would promote finality and prevent collateral attack." Brief for Respondent at 31. Yet the whole point of § 1983 (not to mention that of federal habeas) is to provide a federal forum to protect federal rights that the state system has not adequately protected, regardless of the presence of finality. The finality that Respondent so venerates sometimes constitutes the very state-sponsored abuse that Congress intended to remedy in § 1983. An analysis focused on finality would have precluded the § 1983 action in the hitching post case, *Hope v. Pelzer,* 536 U.S. 730 (2002), which involved no less an adjudicative process than does Petitioner's case.[7] And because challenges to misconduct proceedings, unlike challenges to criminal judgments, would often have no remedy in habeas corpus, Respondent's paradigm would insulate from federal review the very types of constitutional violations § 1983 was made to remedy.[8]

[7] The sanction is often the most critical aspect of the adjudicative package in prison misconduct and criminal proceedings alike, and Respondent's need to preclude from his test challenges to "the nature or severity of punishment," Brief for Respondent at 32 – on no principled basis except to avoid running afoul of this Court's cases (most notably *Hope v. Pelzer* itself) – reveals the extent to which he has strayed from the underlying purpose of favorable termination.

[8] As in *Crawford-El v. Britton,* "[i]ronically, the heightened standard of proof directly limits the availability of the remedy in cases involving the specific evil at which the Civil Rights Act of 1871 (the

(Continued on following page)

The analogy to malicious prosecution "becomes helpful," as Justice Souter has noted, "not in dictating the elements of a § 1983 cause of action, but in suggesting a relatively simple way to avoid collisions at the intersection of habeas and § 1983." *Heck v. Humphrey,* 512 U.S. at 498 (Souter, J., concurring in the judgment). Thus the analogy's utility stems *not* from any factual similarity between a particular § 1983 claim and the tort of malicious prosecution itself,[9] but from the striking correlation between the interest in protecting a state criminal judgment from a conflicting judgment in a civil malicious prosecution case and the interest in preserving federal habeas as the primary federal means of challenging a state criminal judgment. Just as the favorable termination requirement for malicious prosecution cases provided a way to avoid a clash between a state civil court's judgment and a state criminal court's judgment, it likewise provided the *Heck* Court with a model for reconciling the potential conflict between federal habeas and § 1983 cases when a prisoner uses § 1983 to challenge his underlying conviction or sentence. And unlike Respondent's use of the malicious prosecution analogy, this view honors *Preiser*'s unwavering focus upon the fact or duration of custody and protects the integrity of the habeas exhaustion requirement.

Respondent's reliance upon the malicious prosecution tort warps the discrete structural role the analogy played

predecessor of § 1983) was originally aimed – race discrimination." 523 U.S. at 595 n.16 (citing *Monroe v. Pape,* 365 U.S. 167, 174-175 (1961)).

[9] *Heck*'s holding plainly applies to § 1983 actions whose circumstances do not resemble malicious prosecution as long as "a judgment in favor of the plaintiff would necessarily imply the invalidity of [the inmate's] conviction or sentence." *Heck,* 512 U.S. at 487. In *Edwards v. Balisok,* for example, a decision that never mentions any common law analogy, this Court applied the favorable termination requirement in the context of a biased hearing officer. 520 U.S. at 647.

in *Heck v. Humphrey* by seeking to import the tort's elements directly into § 1983. *See* Brief for Respondent at 28-30. As noted above, *see supra* note 9, such an approach contradicts *Heck*'s holding, which applies the favorable termination requirement across the board to all § 1983 actions that attack a state court judgment, not just those that factually resemble malicious prosecution. 512 U.S. at 487. Moreover, Respondent's attempt to equate a constitutional cause of action brought under § 1983 with the closest-looking common law tort contradicts this Court's reminder that § 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver,* 510 U.S. 266, 271 (1994) (citation and internal quotations omitted). This Court has repeatedly held that the common law on torts is not coextensive with constitutional rights just because a state actor is involved. *See, e.g., Paul v. Davis,* 424 U.S. 693, 711-712 (1976) (defamation by a state actor is not a deprivation of liberty); *Daniels v. Williams,* 474 U.S. 327, 300 (1986) (state actor's negligence causing injury not a "deprivation in the *constitutional sense*") (emphasis in original; citation omitted).

Contrary to Respondent's suggestion, this Court's recognition of immunity for certain defendants in the context of § 1983 cases is not precedent for judicially amending the Civil Rights Act on policy grounds. Rather, this Court has accorded immunity to particular classes of § 1983 defendants only where a "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine." *Wyatt v. Cole,* 504 U.S. 158, 164 (1992) (internal quotation omitted). The "policy reasons" the Court referred to are not the "freewheeling policy choice[s]" that a court might make today in determining the scope of an immunity, *see Wyatt,* 504 U.S. at 170 (Kennedy, J., concurring) (citation omitted), but considerations that demonstrate whether Congress meant to exclude from § 1983 immunities

that were otherwise available under the common law. 504 U.S. at 164; *see, e.g., Tenney v. Brandhove,* 341 U.S. 367, 376 (1951) (holding that § 1983 did not abrogate the common law absolute immunity for lawmakers). In other words, an examination of the immunity doctrine's policies and purposes is important to determine whether "irrespective of the common law support . . . § 1983's history or purpose counsel against applying it in § 1983 actions," thereby clarifying whether it was "an immunity at common law that Congress intended to incorporate in the Civil Rights Act." *Wyatt,* 504 U.S. at 164. Although Respondent portrays this Court's treatment of immunities as endorsing the reliance upon policy considerations in interpreting § 1983, *see* Brief for Respondent at 22, the Court's immunity cases uniformly and unambiguously confirm that the only immunities the Court will "read in" to § 1983 are those the Congress would not have intended to abrogate.[10]

The language of § 1983 is not mysterious. The statute contains "two essential elements," which are "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United

[10] Relatedly, the imposition of statutes of limitations in § 1983 cases fails to demonstrate the propriety of judicially amending the statute to honor "weighty policies." In *Felder v. Casey,* 487 U.S. 131, 138 (1987), this Court stated that "[b]ecause statutes of limitation are among the universally familiar aspects of litigation considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right enforceable in perpetuity." In that case, however, the Court deemed a Wisconsin notice-of-claim statute preempted when a § 1983 suit is brought in state court because there was "no reason to suppose that Congress intended federal courts to apply such rules," which are "inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law." *Id.* at 140, 153.

States." *Parratt v. Taylor,* 451 U.S. 527, 535 (1981). Neither the statute's terms nor its history reveals any basis for requiring favorable termination in challenges to adjudications like prison misconduct hearings. The common law is undeniably a valuable tool for interpreting statutes. It is not, however, a fitting source from which to devise newfangled elements for a venerable statute designed to enforce deep-rooted constitutional rights.

Respondent's Misplaced Reliance Upon Cases Defining Substantive Rights

Respondent's heavy reliance upon this Court's decisions identifying the parameters of prisoners' constitutional rights leads to his own "great non-sequitur," *see Spencer v. Kemna,* 523 U.S. 1, 988 (1998) – namely, the suggestion that this Court's recognition that the substantive rights of prisoners are sometimes restricted by penological objectives somehow warrants limitations upon the remedies § 1983 can provide to prisoners when those limited rights are violated. In support of his proposition that § 1983 only permits limited causes of action for prisoners, Respondent relies upon cases holding that inmates do not have a reasonable expectation of privacy in their prison cells under the Fourth Amendment, *Hudson v. Palmer,* 468 U.S. 517, 526 (1984), that they do not have a First Amendment right to provide legal assistance to fellow inmates, *Shaw v. Murphy,* 532 U.S. 223, 231-232 (2001), and that they do not have an Eighth Amendment right to be free from negligent diagnosis or treatment of a medical condition, *Estelle v. Gamble,* 429 U.S. 97, 105-106 (1976), or from long-term punitive bans on visitation, *Overton v. Bazzetta,* 123 S. Ct. 2162, 2170 (2003). All of these cases evaluate the nature of the substantive constitutional rights inmates enjoy in prison. They say nothing about whether an inmate who does possess such a right can use § 1983 to seek damages for a prison official's violation of that right.

Respondent has never disputed that a prisoner has a right to be free from retaliatory acts for exercising a protected First Amendment right. Nor could he, as it is "clearly established" that "the First Amendment bars retaliation for protected speech." *Crawford-El v. Britton,* 523 U.S. at 592 (prisoner bringing § 1983 action against corrections officer for retaliating against him for exercising his First Amendment rights need not demonstrate clear and convincing evidence of improper motive to defeat summary judgment motion); *Pickering v. Board of Educ.,* 391 U.S. 563, 574 (1968) (recognizing cause of action under First Amendment for retaliation for the exercise of free speech or other constitutional rights). This long recognized right has already been trimmed to account for the operational concerns of prison systems that are the focus of Respondent's brief. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539, 555-574 (1974); *Sandin v. Conner,* 515 U.S. 472, 477, 480 (1995). There is no basis for reading any additional procedural restrictions into a statute that does not impose them.

The Relevance of the Prison Litigation Reform Act

Respondent's only answer to Petitioner's argument that the Prison Litigation Reform Act (PLRA) proves that Congress's intent in § 1983 prison conditions lawsuits was to require administrative exhaustion rather than favorable termination of judicial remedies is the empty observation that the exhaustion requirement is "independent from" the favorable termination requirement because "exhaustion is a procedural requirement" while "favorable termination is a substantive requirement." Brief for Respondent at 35. Even if Respondent is right that the

favorable termination requirement is substantive,[11] this Court did not deem that distinction important when it explicitly relied upon the PLRA as evidence of what Congress intended in another case in which the Court was asked to identify substantive limitations to § 1983. In *Crawford-El v. Britton*, this Court rejected an argument that in cases in which a prison official's improper motive is a necessary element, § 1983 should be foreclosed unless the plaintiff could adduce clear and convincing evidence of that motive. 523 U.S. at 592-597. In the Court's view, the PLRA "highlights our concern with judicial rulemaking to protect officials from damages actions" given that Congress already curbed prisoner civil rights suits when it enacted provisions in the PLRA that, among other things, require all inmates to pay filing fees, limit attorney's fees, and deny *in forma pauperis* status to prisoners with three or more prior dismissals due to frivolous or malicious filings or for failure to state a claim. *Id.* at 596-597.

With respect to Respondent's "concerns for prison management" and other "weighty policies," Brief for Respondent at 11, Congress already grappled with such considerations when it determined that the policy interests it cared about were best served by an exhaustion requirement, not a favorable termination requirement, for § 1983 prison condition claims. It is implicit in the PLRA's exhaustion requirement that regardless of his success in

[11] Though he is not. Both the PLRA's exhaustion requirement and *Heck*'s favorable termination requirement speak to when the cause of action *accrues* and what actions the prisoner must take before the cause of action can proceed. *See, e.g., Heck*, 512 U.S. at 489 ("a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence *does not accrue* until the conviction or sentence has been invalidated") (emphasis added). There is little that is substantive about a rule that requires a prisoner to adjudicate his claim successfully in one forum before he can seek damages in another.

the state proceedings, a prisoner can sue under § 1983 after exhausting his administrative remedies. Here, as in *Crawford-El*, "[i]f there is a compelling need to frame new rules of law" based on Respondent's concerns about comity and deference to the judgment of prison officials, "presumably Congress either would have dealt with the problem in the Reform Act, or will respond to it in future legislation." *Id.* at 597.

III. THOUGH THE QUESTION WHETHER PETITIONER'S CONDITIONS-BASED CHALLENGE STRICTLY ATTACKS THE RESULT OF THE MISCONDUCT HEARING IS IRRELEVANT UNDER *PREISER*, RESPONDENT MISTAKENLY PORTRAYS THE CLAIM AS A COLLATERAL ATTACK ON PETITIONER'S MISCONDUCT CONVICTION.

Respondent argues that Petitioner's § 1983 action is "in effect, a collateral attack on his misconduct conviction." Brief for Respondent at 18. Even if Petitioner were challenging the result of his misconduct proceeding, his § 1983 action could still proceed because his lawsuit is not seeking to cast doubt upon the fact or duration of his confinement in prison. Only under a misreading of *Edwards* that eviscerates the conceptual underpinnings of the rule to which this Court has unfailingly adhered since *Preiser* is the question whether Petitioner is collaterally attacking the outcome of the misconduct proceeding relevant to the viability of Petitioner's claim. If *Preiser* remains good law, an unambiguous challenge to the result of a disciplinary hearing can proceed under § 1983, unhindered by the favorable termination requirement, as long as the claim would not lead to the restoration of good-time credits or

otherwise necessarily imply the invalidity of the prisoner's conviction or sentence.[12]

Respondent's betrayal of *Preiser*'s long-settled framework does him little good, however, because he still fails to establish that success in Petitioner's § 1983 action would necessarily imply the invalidity of the misconduct proceeding. While that is what *Heck*'s test would require if, as Respondent contends, *Heck* applies to prison misconduct hearings, Respondent's brief is devoid of rigorous analysis comparing the § 1983 claim to the result of the misconduct hearing. In his Report and Recommendation on Respondent's motions for dismissal and summary judgment, Magistrate Judge Binder clarified the § 1983 allegations, noting Petitioner's concession of his guilt of the insolence charge[13] and characterizing the complaint as "two-fold: first, that Defendant instigated the entire confrontation to provoke Plaintiff, and second, that when that plan was successful, Defendant then wrote Plaintiff up for a more severe violation[] (one that required mandatory immediate detention), than was warranted by Plaintiff's actions."

[12] In a not-so-veiled request to overrule *Preiser v. Rodriguez sub silentio*, Respondent calls it an "inconsistent and illogical result" to allow a prisoner punished with several years of administrative segregation to bring a § 1983 challenge but to forbid such an action for a prisoner who loses only one day of good-time credits. Brief for Respondent at 32. In its examination of the intersection between § 1983 and habeas, this Court in *Preiser* unambiguously endorsed this bright line between challenges to conditions and challenges to fact or duration that Respondent deems so illogical. *Preiser*, 411 U.S. at 488-490; *see also Heck v. Humphrey*, 512 U.S. at 486-487.

[13] While Respondent suggests that Petitioner's concession of guilt of insolence is a new admission and a "current litigation posture" that he only "now" makes in the Supreme Court, Brief for Respondent at 17, the magistrate judge adopted this position at the very outset of this litigation in his first Report and Recommendation on Respondent's initial motion to dismiss. Brief in Opposition 27a (noting that "Plaintiff agrees that he was guilty of Insolence").

Brief in Opposition 32a; *see also* JA 72 (Petitioner's amended complaint claiming that "Defendant framed Plaintiff in retaliation for the Plaintiff's exercise of First Amendment rights," specifying that his injury resulted from "defendant's threatening conduct and retaliatory disciplinary action," and requesting damages for injuries "sustained as a result of defendant's retaliatory acts").

Respondent's approach to both the instigation aspect and the overcharging aspect of Petitioner's claim founders because even under his own misguided legal test Respondent cannot satisfy *Heck*. With respect to the instigation aspect of Petitioner's § 1983 action, Respondent essentially acknowledges that his retaliatory actions were not a defense to Petitioner's insolence conviction; Petitioner's success on this claim could therefore not invalidate the result of a prison proceeding. Respondent also fails to satisfy his own test with respect to Petitioner's claim that Respondent overcharged Petitioner for an unconstitutional reason and caused him to serve six days of prehearing detention.[14]

[14] As a threshold matter, the procedural realities of Michigan's disciplinary system wholly undermine Respondent's argument that this claim caused Petitioner no injury because "Petitioner's sentence as a result of his Insolence conviction was really thirteen days of total detention." Brief for Respondent at 18. A Michigan hearing officer has the discretion to give credit for time served in administrative segregation, but he "is not required to do so," *see* JA 31, and the hearing officer in this case gave no such credit. His report states that Petitioner was given "7 Days of Detention" beginning the day of the hearing, May 27, 1997, and ending June 3, 1997. JA 58-59. Magistrate Judge Binder also viewed the prehearing and posthearing detentions as separate injuries, noting that the seven days of detention was not at issue given Petitioner's conceded guilt of insolence but that the six days of mandatory prehearing detention, which "Plaintiff experienced as a result of being charged with a nonbondable offense," were "definitely in issue," notwithstanding that concession. Brief in Opposition 27a. *See also* Record 18 at 6-7 (Respondent stating that "[a]ll that Plaintiff received as a sanction for the misconduct was 7 days detention and 30 days loss of privileges").

Respondent cannot demonstrate that Petitioner's overcharge claim constitutes a collateral attack on the prison misconduct hearing because he cannot identify any extant judgment arising out of that proceeding that Petitioner's § 1983 action would remotely undermine. The claim that Respondent unconstitutionally framed Petitioner is not conducive to a conventional habeas remedy because Petitioner was found not guilty of threatening conduct and in any event had already served the detention caused by the overcharging.[15]

When Respondent cannot show that Petitioner's instigation and overcharge claims would necessarily invalidate the result of the misconduct proceeding, he invents his own tests to bring Petitioner's claim within the scope of the favorable termination requirement. With respect to the allegation of retaliatory instigation, for example, Respondent concedes that the facts surrounding the unconstitutional motive would at most be relevant to the credibility of witnesses but suggests that this relevance is enough to trigger a requirement to favorably terminate. Brief for Respondent at 6. In an extreme departure from the "necessarily invalidates" test of *Heck v. Humphrey,* then, Respondent in effect contends that any time evidence pertaining to the crux of an inmate's § 1983 claim would have been *admissible* in the misconduct hearing, the inmate must favorably terminate. Such a rule

[15] Respondent's argument that "[a] prisoner challenging the validity of a misconduct proceeding that resulted in punishment affecting only the conditions of confinement is subject to the favorable termination requirement even if he is no longer subject to the conditions at the time he brings his § 1983 action" is unsupportable for the same reasons his legal test is unsupportable: it is contrary to the statute's language and purpose and a radical departure from this Court's unvarying approach to the issue up to now. *See* Brief for Petitioner at 44-50.

would stray far from the rationale of avoiding collateral attack through an inappropriate vehicle.

Petitioner also cannot satisfy *Heck*'s "necessarily invalidated" test on the overcharge claim, so he concocts an entirely new "but-for" test that he says compels the conclusion that Petitioner was collaterally attacking the finding of insolence because Petitioner would not have been found guilty *but for* Respondent's retaliatory actions in overcharging him with threatening behavior. This reliance upon a type of "but-for" causation derives from no known legal principle. The proper inquiry for determining when the favorable termination requirement should apply to Petitioner's lawsuit is whether the claim "necessarily impl[ies] the invalidity of his conviction or sentence," *Heck,* 512 U.S. at 487 – a test we know Respondent cannot meet even if *Heck* were extended to the results of misconduct proceedings. *But for* an officer's unlawful arrest of a citizen, that citizen may not have assaulted the officer, but that does not make the unlawful arrest a defense to assault on a police officer. Respondent's "but-for" test would likewise preclude a § 1983 action against a guard who trumped up charges against a prisoner on racial grounds if the prisoner responded by committing a misconduct violation: but for the prison guard's unconstitutional actions, the misconduct sanction would not have occurred. Section 1983's language and purpose cannot plausibly countenance such a result.

CONCLUSION

This Court should reverse the decision of the Sixth Circuit and remand to that court for further proceedings.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

SHAKUR MUHAMMAD, aka John E. Mease,

Petitioner,

v.

MARK CLOSE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF PRISON REFORM ADVOCACY CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

The Prison Reform Advocacy Center (PRAC) is a public interest law firm dedicated to improving prison conditions and reducing reliance on incarceration. Established in 1997, PRAC litigates to enforce constitutional standards regarding medical care, safety and other conditions of confinement; advises inmates on how to exhaust their administrative remedies; provides to the Sixth Circuit Court of Appeals, a summary of prison grievance systems in the states within the Sixth Circuit; educates the public about the collateral consequences of incarceration; and coordinates classes in empowerment, expression and legal rights for women prisoners at a local lock-up in Cincinnati, Ohio. Through its work, PRAC has emerged as a regional and national expert on various criminal justice issues, prison issues and prisoners' rights.[1]

[1] No counsel for any party authored any part of this brief. No persons or entities other than *amicus curiae* made any monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been submitted to the Clerk of the Court.

SUMMARY OF THE ARGUMENT

Petitioner, Shakur Muhammad, a Michigan prisoner, alleges that he was falsely charged with a major misconduct violation, which was filed against him in retaliation for his previous lawsuits and grievances against Respondent. After his release from administrative segregation, Petitioner filed a retaliation action pursuant to 42 U.S.C. §1983, seeking monetary damages. The §1983 action did not challenge the underlying criminal charge or sentence, and did not implicate any entitlement to good time credits.

The questions presented are (1) whether a plaintiff, like Petitioner, who brings a §1983 suit challenging only the conditions of his confinement, rather than the fact or duration of his confinement, must satisfy the favorable termination requirement of *Heck v. Humphrey*, 512 U.S. 477 (1994); and (2) whether a prisoner, like Petitioner, who has been, but is no longer in, administrative segregation, may bring a §1983 suit challenging the conditions of his confinement without first satisfying *Heck*'s favorable termination requirement.

The answer to the first question is no. That answer is supported by a review of the Prison Litigation Reform Act; by a study of the history of the habeas corpus; and by a review of the precedents of this Court.

Both the plain language and the legislative history of the Prison Litigation Reform Act ("PLRA") make clear that a prisoner must simply exhaust his administrative remedies before filing a §1983 action challenging the conditions of his confinement. The prisoner is not required to obtain a favorable termination prior to filing suit in federal court. Congress specifically excluded habeas cases challenging the "fact or duration of confinement in prison" from its definition of actions "with respect to prison conditions." So Congress answered the question before this Court. The debate on the PLRA occurred after this Court decided *Heck*. Congress imposed an exhaustion requirement for two reasons: to stem the flood of frivolous prisoner lawsuits and to give state

prison systems the first opportunity to resolve the inmate's problem. Because Congress is presumed to have been aware of *Heck* at the time it enacted the PLRA, and because Congress, in passing the PLRA, was motivated by a desire to make prisoner lawsuits much more difficult to file, Congress certainly would have included a favorable termination requirement in the PLRA had it wanted to do so. The absence of a favorable termination requirement makes it crystal clear that Congress felt that implementing the exhaustion requirement was sufficient to stem the rising tide of §1983 prisoner lawsuits.

The history of the "great writ" and its treatment by this Court confirms that habeas has never been extended to prison conditions cases. Historically, the writ of habeas corpus has been utilized to free prisoners who are illegally incarcerated. Central to a habeas case is the challenge to the fact or length of a term of imprisonment. The Antiterrorism and Effective Death Penalty Act ("AEDPA") was signed into law on April 24, 1996, two days before the PLRA became effective. The legislative history of the AEDPA reveals that Congress did not require prisoners who file §1983 lawsuits challenging the conditions of their confinement to also file habeas corpus petitions. Moreover, Congress did not extend habeas to challenges to conditions of administrative segregation that are filed after an inmate is no longer in administrative segregation.

The Sixth Circuit Court of Appeals has misapplied this Court's holdings in *Heck* and *Edwards v. Balisok*, 520 U.S. 641 (1997) by requiring prisoners who are placed in administrative segregation to favorably terminate their adverse disciplinary decisions, regardless of whether the prisoner's placement in administrative segregation affects the fact or duration of his confinement.

Thus, the answer to the second question is yes: no favorable termination requirement applies to an inmate who files a §1983 lawsuit after being released from administrative segregation. This Court has never extended *Heck* or *Edwards* that far. The Sixth Circuit is not even sure it is correct to

impose a favorable termination requirement on inmates who claim that discipline is imposed in retaliation for protected activity. *Huey v. Stine*, 230 F.3d 226 (6th Cir. 2000). In fact, the Sixth Circuit has invited this court to set it straight if it is wrong. *Id.* at 230. This Court must accept the Sixth Circuit's invitation by holding that §1983 may be used to challenge the conditions of confinement in administrative segregation, especially when the inmate is no longer incarcerated in administrative segregation, and that no favorable termination requirement need be imposed.

ARGUMENT

I. A SECTION 1983 PLAINTIFF WHO CHALLENGES THE CONDITIONS OF HIS CONFINEMENT IS NOT REQUIRED TO SATISFY *HECK V. HUMPHREY*'S FAVORABLE TERMINATION REQUIREMENT.

Prisoners need only exhaust administrative remedies, not favorably terminate available remedies. Congress told us so when it enacted the PLRA. The Sixth Circuit has ignored Congress, ignored the history of the "Great Writ, " and ignored the precedents set by this Court in holding that all prisoners who challenge discipline must meet a favorable termination requirement.

A. Congress Excluded Habeas Cases From the Definition of Cases Challenging Prison Conditions; An Inmate Need Only Exhaust, Not Favorably Terminate Administrative Proceedings.

On April 26, 1996, President Clinton signed into law the Prison Reform Litigation Act ("PLRA"), which the 104 Congress had enacted as Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub.L. 104-134, 110 Stat. 1321 (1996). The PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title…by a prisoner confined in any jail, prison, or other correctional facility *until such administrative remedies as are available are exhausted.*" 42 U.S.C. §1997e(a) (emphasis added).[2]

[2] A point noted by this Court in *Porter v. Nussle*, 534 U.S. 516, 521 (2002).

Although "action...with respect to prison conditions" is not defined in §1997e, the term is defined, in another PLRA provision which concerns prospective relief, 18 U.S.C. § 3626(g)(2):

> the term "civil action with respect to prison conditions" is "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials in the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison."[3]

This statutory definition is significant for two reasons. First, the broad definition of conditions clearly encompasses retaliation cases; second, the definition affirmatively excludes "habeas corpus proceedings challenging the fact or duration of confinement in prison" from § 1983 prison conditions cases. Conspicuous by its absence is any reference by Congress to the favorable termination requirement of *Heck v. Humphrey*, 512 U.S. 477 (1994). Thus, Congress relied on the traditional, narrow definition of habeas and has necessarily answered in the negative the first certiorari question presented here: there is no favorable termination requirement for §1983 cases that challenge only conditions and not the fact or duration of confinement.

In *Porter,* this Court noted that the purpose of the PLRA was to reduce frivolous inmate filings and provide to state prison officials an opportunity to address problems before they come to court. This Court has not suggested that an inmate must win a state administrative grievance, only that he complete the process in order to clarify "the contours of the controversy":

> Beyond doubt, Congress enacted §1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation. In other instances, the internal review might "filter out some frivolous claims." And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy.

Porter, 534 U.S. at 524-525 (internal citations omitted).

Had Congress wanted to make favorable termination rather than termination, i.e., exhaustion, the requirement, it could have easily done so. This Court decided *Heck* on June 24, 1994. The Congressional debates on the PLRA took place during the summer and fall months of 1995, and the PLRA was signed into law on April 26, 1996. Therefore, if Congress had intended to incorporate *Heck*'s favorable termination requirement into the PLRA and mandate that prisoners challenging the conditions of their confinement must first seek and obtain favorable termination of their claims, Congress would have done so. As this Court has held, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents...and that it expect[s] its enactment[s] to be interpreted in conformity with them." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995)(*citing Cannon v. Univ. of Chicago*, 441 U.S.

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[3] In *Porter*, the Court debated, without deciding, whether it was appropriate to borrow the definition of "prison conditions" in 18 U.S.C.§3626(g)(2) for the purpose of determining when a prisoner had to exhaust administrative remedies. Regardless of the answer to that query, there should be no question that it is appropriate to look to §3626 in deciding whether Congress intended to blur the distinction between habeas and §1983 actions when it enacted the PLRA.

677, 699 (1979)).[4] The fact that Congress did not incorporate a favorable termination requirement into the PLRA, despite its presumed awareness of this Court's decision in *Heck*, makes it clear that Congress did not intend to impose the more burdensome favorable termination requirement on prisoners who seek to challenge their conditions of confinement.

Despite Congress's emphasis on discouraging frivolous litigation, Senator Hatch, a PLRA author, made it clear that a PLRA objective was to preserve the right of prisoners to file legitimate §1983 conditions lawsuits in federal courts:

> No one, of course, is suggesting that prison conditions that actually violate the Constitution should be allowed to persist....It is time to restore sanity to this system by imposing legitimate limits on the ability of inmates to tie the courts and prisons in knots through frivolous lawsuits. Procedures must be modified to quickly identify the viable prisoner claims and weed out the meritless chaff. The money saved by reducing litigation costs could more appropriately be used by the states to help ensure that adequate prison space is available, and the courts will have more time to devote to truly worthy prisoner claims.

Enhancing the Effectiveness of Incarceration: Hearing on Prison Reform Before the Senate Judiciary Committee, 104th

[4] This Court made a similar statutory interpretation argument in *Booth v. Churner*, 532 U.S. 731 (2001) when it held that exhaustion was required even when the remedy sought by the inmate was not offered in the administrative scheme. "It has to be significant that Congress removed the very term we had previously emphasized in reaching the result Booth now seeks, and the fair inference to be drawn is that Congress meant to preclude the *McCarthy* result." *Booth,*, 532 U.S. at 740. (In *McCarthy v. Madigan*, 503 U.S. 140, 155-156 (1992), this Court had held that inmates did not have to exhaust procedures that did not offer the relief sought by the inmate).

Cong. (1995)(statement of Senator Orrin Hatch, Member, Senate Judiciary Committee).

B. Historically The Writ Of Habeas Corpus Applies Only to Challenges to the Fact or Duration of Incarceration and Not to Prison Conditions Cases.

This case is about whether Shakir Muhammad was the victim of retaliation in prison, not whether he belongs in prison, or whether his conviction is proper, or whether his sentence is correct. Relief in this case will not affect those issues. A careful examination of the history of the writ of habeas corpus demonstrates that it has always been tied to challenging custody itself, not the conditions of that custody.

1. Introduction to the History of the Great Writ

The writ of habeas corpus has traditionally "constituted the major barrier between government and the wrongful detention of any person." Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 622 (1994). In *Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973), this Court correctly held that "[i]f a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate or available remedy."

2. The Writ at Common Law

The common law and statutory evolution of the writ of habeas corpus is consistent with this Court's holding in *Preiser*. Blackstone hailed the Great Writ, habeas corpus *ad subjuciendum*, as "the most celebrated writ in the English

law." 3 BLACKSTONE, COMMENTARIES 129 (Am. ed. 1832). Its origins can be traced to the Magna Charta. Originally, the writ came in several different forms[5] and was used as an independent remedy for the first time at the beginning of the sixteenth century.[6]

In 1641, an act of Parliament authorized the courts of King's Bench or CommonPleas to issue the writ of habeas corpus *ad subjiciendum* to inquire about the cause of detention in both civil and criminal cases. Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L.REV. 451, 460 (1966). The Habeas Corpus Act of 1679 "merely clarified which courts or judicial officers could issue the writ, empowered judicial officers to issue it when courts were not in session, and established rules to govern the practice incident to the writ and to prevent its evasion." *Id.*

Under the Habeas Corpus Act of 1679, "the use of the Great Writ against official restraints was simply to ensure that a person was not held without formal charges and that once charged he was either bailed or brought to trial within a

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[5] *Ad respondendum* (to remove a prisoner confined by process of an inferior court to charge him with an action in the court above); *ad satisfaciendum* (to remove a prisoner to charge him with execution in the court above); *ad faciendum et recipiendum*, sometimes called *cum causa* (to remove a cause and a prisoner from an inferior court to the courts in Westminster); *ad prosequendum, testificandum,* or *deliberandum* (to remove a prisoner in order to prosecute or testify in an action or to be tried in the proper jurisdiction). Blackstone, *supra.* at 129-31 (*cited in* Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U.CHI. L.REV. 243 n. 3 (1965).

[6] According to Oaks, the writ of habeas corpus was used as an independent remedy for the first time at the beginning of the sixteenth century, when the writ of habeas corpus *cum causa* became a tool that the courts of King's Bench and Common Pleas utilized to establish their supremacy over the courts of Chancery and the Exchequer, the Privy Council, and the courts of Admiralty, Requests, and High Commission. Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L.REV. 451, 459 (1966).

specified time. If a prisoner was held by a valid warrant or pursuant to the execution or judgment of a proper court, he could not obtain release by habeas corpus." Oaks, *Habeas Corpus in the States—1776—1865* at 245.

3. The Writ in America

The American colonies imported the common-law writ.[7] The federal constitution included the writ and the provision was copied by the original thirteen states as well as the states that entered the Union after 1789.[8] Oaks, *Habeas Corpus in the States—1776—1865* at 249.

Congress included a habeas corpus provision that allowed only federal prisoners to seek habeas corpus in the

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[7] Originally, only three of the twelve states that had adopted written constitutions during the first decade following the Revolutionary War (North Carolina, Massachusetts and Georgia) mentioned the writ of habeas corpus. When the constitutional convention convened in Philadelphia in 1787, four states (North Carolina, Massachusetts, Georgia and New Hampshire) had included habeas corpus guarantees in their state constitutions; eight had no guarantees; and one state (Rhode Island) had no written constitution at all. Oaks, *Habeas Corpus in the States—1776-1865* at 247-248.

[8] By 1844, the five original colonies that had no constitutional provision, plus Rhode Island and Georgia, had adopted constitutional provisions modeled after Art. I, sec. 9, cl. 2. Massachusetts, North Carolina and Massachusetts kept their original provisions. Except for Vermont, the twenty-one new states admitted to the Union after 1787 and prior to 1860 adopted constitutional provisions that were identical to the federal guarantee. Virginia added its provision, which did not allow suspension under any circumstances, in 1830. Vermont adopted its provision, which was modeled on Virginia's, in 1836. Maryland adopted its provision in 1867 and South Carolina's became effective in 1868. Interestingly, the Constitution of the Confederate States of America also included the federal provision. Between 1867 and 1876, seven states—Alabama, Missouri, Texas, Louisiana, North Carolina, West Virginia and Maryland—adopted provisions specifically prohibiting the suspension of the writ of habeas corpus under any circumstances. Oaks, *Habeas Corpus in the States—1776-1865*, at 249-250, nn. 29-32, 34, 36.

Judiciary Act of 1789.[9] In addition to the limitation on who could seek the writ, this Court limited the statute's application to the uses derived from the black-letter common law. Therefore, consistent with the common law, if a court of competent jurisdiction committed substantive error, the prisoner's detention was not rendered illegal for habeas corpus purposes. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 466 (1963).

Congress expanded the applicability of habeas corpus to state prisoners when it enacted the Habeas Corpus Act of 1867.[10] Although the new law applied to many more prisoners than had the Judiciary Act of 1789, "the basic and well-understood principle deeply imbedded in the law of the time [was] that a detention pursuant to the judgment of a competent tribunal is not illegal and does not, for purposes of collateral attack, "violate " the "law," even if error occurred." Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners* at 475. Despite the apparent statutory expansion, "there is no indication whatsoever that the bill intended to change the general *nature* of the classical habeas jurisdiction; that is, that it intended to expand the classes or categories of questions thought to be appropriately tested on collateral attack." *Id.* at 476-477 (emphasis in original).

This Court confirmed Congress's conservatism in *Ex parte Royall*, 117 U.S. 241 (1886), when it first articulated the exhaustion doctrine.[11] Although state courts began to enforce the exhaustion requirement with increasing rigidity after 1892, Congress did not codify the doctrine until it amended the Judicial Code in 1948.[12]

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[9] Section 14 of the Judiciary Act of 1789 provided:

> That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus*, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have the power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—Provided, That writs of *habeas corpus* shall in no case extend to prisoners in goal, unless where they are in custody, under or by colour of the authority of the United States, or as committed for trial before some court of the same, or are necessary to be brought into court to testify.

Judiciary Act of 1789, 1 Stat. 81 (1789).

[10] The Habeas Corpus Act of 1867, ch. 28, §1, 14 Stat. 385, (1867), stated that

> the several courts of the United States…within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States….

[11] In *Royall*, this Court held:

> We cannot suppose that Congress intended to compel…[the federal] courts…to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts….The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union, and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect the rights secured by the Constitution.
>
> 117 U.S. at 251.

[12] The codified exhaustion rule provided:

> (b) An Application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State correc-

In 1953, the writ of habeas corpus entered the modern era when this Court held that "it is the purpose of the federal habeas corpus jurisdiction to redetermine the merits of federal constitutional questions decided in state criminal proceedings." *Brown v. Allen*, 344 U.S. 443 (1953). In *Brown*, this Court held that the petitioner was entitled to a full reconsideration of his constitutional claims, including a redetermination of legal and factual issues, through a writ of federal habeas corpus, even though the state court had fully and fairly adjudicated his claims. *Brown*, 344 U.S. at 466-476. This expansive view of the role of federal habeas corpus to collaterally attack state court convictions continued to develop in such cases as *Fay v. Noia*, 372 U.S. 391 (1963) (holding that a prisoner who deliberately bypassed state appellate relief was not precluded from seeking federal habeas corpus relief) and *Kaufman v. United States*, 394 U.S. 217 (1969) (holding that search and seizure claims were cognizable under 28 U.S.C. § 2255). It was not until 1976, when this Court decided *Stone v. Powell*, 428 U.S. 465 (1976), that "the tide began to ebb and the "Great Writ" began to appear as something less than "great." Margolis, *Habeas Corpus: The No-Longer Great Writ, supra*, at 566.

4. 1996 Amendments to Habeas Statute

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (1996), sharply curtailed prisoners' ability to collaterally attack their

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tive process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An Applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

62 Stat. 967 (1948), *amended by* 28 U.S.C. §2254(b)(1),(c).

unconstitutional convictions. The AEDPA was signed into law on April 24, 1996, two days before the PLRA became effective. Although the two statutes were enacted contemporaneously, and both attempted to curtail what Congress considered to be a dramatic rise in the number of frivolous lawsuits and habeas corpus petitions being filed by prisoners in the federal district courts, the enactment of the two laws was influenced by very different policy considerations.

Unlike the PLRA, the AEDPA was part of the Republican majority's "Contract with America." 141 CONG. REC. H1408 (daily ed. Feb. 8, 1995) (statement of Rep. Chabot) ("By moving forward on this bill, the Effective Death Penalty Act, we are fulfilling another element of the Contract with America." The enactment of the AEDPA was motivated in part by the tragic bombing of the Murrah federal building that occurred in Oklahoma City in April 1995. Because of this connection with the Oklahoma City bombing and the federal prosecution of its perpetrator, Timothy McVeigh, Congress felt that there was an urgent need to engage in habeas corpus reform out of respect to the families of McVeigh's victims as well as other victims of violent crime.

> There are several important parts of the bill that is before us, but the one key element that will help the victims of the Oklahoma City bomber and other victims of violent crime in [sic] habeas corpus reform....
>
> In Oklahoma City they had a press conference and came to the State capitol to urge Congress and the President to implement habeas corpus legislation that would significantly reduce the appeals process and expedite the imposition of death sentences. In strained, choking voices, they talked of the tragedy that tore at the city, leaving shattered families still only beginning to absorb the depths of their losses. Connie Williams wore a button with her dead son Scott's

> picture, bearing the words "Beloved Scott, Our Special Angel." His pregnant wife, Nicole, said, "I do not want his daughter to be in high school wondering why his killers are still on death row."
>
> She is right.

141 CONG. REC. S7820 (daily ed. June 5, 1995) (statement of Sen. Nickles).

Opponents of the AEDPA, however, viewed this sentiment as an ideal opportunity for proponents of the death penalty to reform habeas corpus procedures in order to accelerate the pace at which executions would occur.

> With this time-honored tradition of habeas corpus so much a part of the bedrock legal principles which underpin our society, why are we considering changing it at all? The answer is clear and has been readily acknowledged by the proponents of this so-called reform: they want to expedite the execution of those who have received the death penalty.

Id. at S7851 (dailey ed. June 5, 1995) (statement of Sen. Pell)

AEDPA proponents, on the other hand, believed that habeas corpus reform was needed in order to require federal courts to show more deference to state court findings and to provide some sense of finality to state court death penalty convictions.

> ...habeas corpus defeats the demand for finality. The current system of Federal habeas corpus defeats the important objective of having an end to litigation...the way our habeas system is used nullifies capital sentences. The constitutionality of the death penalty has been settled since 1976. Thirty-eight states now authorize capital punishment, but the inefficiency of current procedures has resulted in a de facto nullification of capital punishment laws. The public interest organizations that routinely involve themselves in capital cases have fully exploited the system's potential for obstruction. Delay is maximized by deferring collateral attack until the eve of execution. Once a stay of execution has been obtained, the possibility of carrying out the sentence is foreclosed for additional years as the case works its way through multiple layers of State and Federal courts.

Id. at S7822 (statement of Sen. Nickles).

Proponents of habeas corpus reform also believed that the original purpose of the writ of habeas corpus had been subverted and that reform was necessary to insure that the writ would be utilized for its originally intended limited purpose.

> In the early history of this country, habeas review was not available at common law to review by any other court a conviction of a felony entered by a court of competent jurisdiction. The function of the writ was to free people who had been imprisoned illegally...The constitutional great writ is preconviction.
>
> That is the Constitution writ. The writ of habeas corpus we are talking about today is postconviction, and it is a statutory writ that can be changed readily by the Congress of the United States.

Id. at S7836 (statement of Sen. Hatch).

The above excerpts reveal that Congress debated several policy considerations, such as federalism, the death penalty, the finality of criminal convictions, and victims' rights, that are unique to habeas corpus and that simply are

not implicated in conditions-only §1983 lawsuits. Although comity is a concern that affects both §1983 conditions and habeas corpus litigation, Congress dealt with the comity issue in two distinct ways in the AEDPA and the PLRA. In the PLRA, Congress enacted the exhaustion of administrative remedies requirement found in 42 U.S.C. §1997e(a). Congress's objective was to give prison officials the opportunity to remedy adverse prison conditions before permitting prisoners to litigate those issues in federal district court. In the AEDPA, Congress required prisoners to exhaust their state court remedies unless the state judicial process is inadequate or unless doing so would be futile.

Although the writ of habeas corpus has maintained its traditional role as a restraint against unlawful confinement, it has evolved into the primary means by which a prisoner may collaterally attack the constitutionality of the criminal conviction that resulted in his incarceration. The constitutionality of the confinement that is at issue in a writ of habeas corpus is that of the prisoner's underlying criminal conviction, *not* his placement in administrative segregation. As set out below this court has always required that some impact on the underlying sentence be demonstrated before acknowledging habeas as relevant. The Sixth Circuit's rule completely forsakes this history of limiting the writ of habeas corpus to challenges to the fact or duration of the criminal conviction or sentence.

C. The Sixth Circuit's Holding Ignores the Precedents of this Court Which Limit Habeas to Cases Where the Fact or Duration of Confinement on the Underlying Criminal Charges Are at Issue

The complete legal analysis in the unreported decision of the Sixth Circuit in this case is three sentences long:

> Thus, this case falls directly within the doctrine of *Heck v. Humphrey*, which this circuit applied to a prisoner seeking damages and expungement of a disciplinary infraction in *Huey v. Stine*. "In order to grant the plaintiff in this case the relief he seeks, we would have to unwind the judgment of the state agency." Thus, *Heck* bars the plaintiff's action under 42 U.S. C. §1983.

Muhammad v. Close, 47 Fed.Appx. 738, 739 (6th Cir. 2002) (internal citations omitted).

The Sixth Circuit's analysis below ignores this Court's precedent concerning the distinction between habeas corpus and §1983 suits challenging a prisoner's conditions of confinement. In *Preiser*, this Court reviewed the history of the writ of habeas corpus, emphasizing that the writ has "evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction." *Preiser*, 411 U.S. at 485. This Court then concluded that 'the respondent's suits...fell squarely within this traditional scope of habeas corpus..." because "the deprivation of their good-conduct-time credits was causing or would cause them to be in illegal confinement...." *Id.* at 487. However, this Court limited its holding in *Preiser* to the factual scenario at issue: a prisoner seeking to restore his good time credits because restoration of those credits would directly affect the duration of his confinement. *Id.* 411 U.S. at 494.

In *Heck*, this Court extended *Preiser*, to situations in which a prisoner's §1983 damages claim "would render a conviction or sentence invalid..." and held that a damages claim in that instance "is not cognizable under §1983." *Heck*, 512 U.S. at 487. This Court, however, also held that "if the district court determines that the plaintiff's action, even if successful will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed in the absence of some other bar to the suit." *Id.* Therefore, this Court expressly acknowledged that *Heck*'s favorable termination rule does not

apply to every prisoner's §1983 damages claim, but only to those claims that, if successful, would invalidate the prisoner's conviction or sentence.

In *Edwards v. Balisok*, this Court reaffirmed its previous decisions in *Preiser* and *Heck* by holding that a prisoner who brought a §1983 damages challenging the procedures used in his disciplinary hearing had to satisfy *Heck*'s favorable termination rule because, if his suit succeeded, his good time credits would be restored, thus directly affecting the duration of his confinement. *Edwards*, 520 U.S. at 646. However, this Court suggested that Balisok could still bring his §1983 action seeking injunctive relief against prison officials for failing to timely date-stamp witness statements because that action would not "necessarily imply" the invalidity of a previous loss of good-time credits...." *Id.* at 648.

In *Spencer v. Kemna*, 523 U.S. 1 (1998), this Court rejected as moot the petitioner's habeas corpus petition challenging his parole revocation on the grounds that the "reincarceration that he incurred as a result of that action is now over, and cannot be undone." *Id.* at 8. This Court refused to presume that petitioner had suffered "collateral consequences adequate to meet Article III's injury-in-fact requirement...." *Id.* at 14. More importantly, however, five members of this Court agreed that "a former prisoner, no longer "in custody," may bring a §1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable termination requirement that it would be impossible for him as a matter of law to satisfy." *Id.* at 21, 22, 25 n. 8.

This Court's jurisprudence emphasizes that a §1983 damages claim is the proper vehicle to bring a suit challenging the unconstitutional conditions of a prisoner's confinement, while a petition for a writ of habeas corpus is the means by which prisoners who are illegally incarcerated may gain their freedom immediately or in an expedited manner by successfully challenging the fact or duration of their confinement.

It is this jurisprudence that the Sixth Circuit conveniently ignores. In *Huey*, the Sixth Circuit held that since Huey's §1983 Eighth Amendment claim was "founded solely on an allegation that a corrections officer fals fied a misconduct report, then *Heck* applies." *Huey*, 230 F.3d at 231. The Court acknowledged that it "has, in unpublished opinions, applied the *Heck/Edwards* doctrine generally to prevent a prisoner found guilty in a prison disciplinary hearing from using §1983 to collaterally attack the hearing's validity." *Id.* at 228-229. The history of the writ, Congressional actions, and the actions of this court require some implication of the underlying sentence, not simply a challenge to a misconduct ticket. In *Huey*, therefore, the Sixth Circuit dropped the important tether to the underlying conviction when it improperly extended habeas rules to §1983 actions.

But the court did not stop there. Next, the Court analyzed Mr. Huey's contention that if the Court applied *Heck* to his claim, he would be denied a federal forum since he had already served his thirty day segregation sentence and thus had no way to seek and obtain favorable termination through a writ of habeas corpus before litigating his §1983 action. *Id.* at 229. The Court admitted that Huey's argument was "not entirely without force". *Id.* Despite its doubts concerning the "universality of the "favorable termination" requirement in light of this Court's decision in *Spencer*, the Court nevertheless chose to "continue to follow the Supreme Court's directly applicable precedent and "leave to the Court 'the prerogative of overruling its own decisions.'" *Id.* at 230.

The Sixth Circuit's flawed reasoning in *Huey* led to the erroneous decision below. In *Huey*, the Court assumed, without citing any authority, that *Heck* barred Huey's §1983 misconduct claim because it precluded the Court from "annul[ing] the judgment of the Michigan Department of Corrections." *Id.* at 231. This analysis is based on the Sixth Circuit's failure to remember the context in which this Court decided *Heck*; that is, a prisoner whose direct appeal of his criminal conviction was still pending in the Indiana state court system when he filed a §1983 action alleging that the

police and prosecutors had engaged in an unlawful investigation and destroyed potentially exculpatory evidence. *Heck*, 512 U.S. at 478-479.

The decision that would be "annulled" in Huey or "unwound" in the case at bar is an administrative disciplinary decision by prison staff members. Such administrative rulings are based only on "some evidence." *Superintendent v. Hill*, 472 U.S. 445, 454 (1985). Such rulings are rendered with a minimum of due process. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Such rulings are not an appropriate basis for arguing issue preclusion and yet that is the status they achieve under the Sixth Circuit decisions. *Huey*, 230 F.3d at 231; *Muhammad*, 47 Fed.Appx. at 739. That is, the administrative decisions become unassailable without achieving a favorable termination in the administrative process itself. No precedent of this Court supports such a holding.

The Sixth Circuit's decision in *Huey* is also flawed because it is based on an unpublished decision, *Riley v. Kurtz*, 1999 WL 801560 (6th Cir. Sept. 28, 1999), which misinterpreted this Court's holdings in *Edwards* and *Spencer*. In *Riley*, the Sixth Circuit held that Riley was attempting to extend the rationale of *Spencer*'s concurring opinions "from situations where habeas corpus is procedurally barred to situations, as in the present case, where the §1983 plaintiff met with an unsuccessful outcome in a prison disciplinary hearing but has served his full punishment for the infraction." *Riley*, 1999 WL 801560 at *5.

The court's analysis in *Riley* is flawed because the court fails to understand that Riley *was* procedurally barred from filing a federal habeas corpus petition. Riley was found guilty of one charge of misconduct and spent fifteen days in disciplinary segregation. *Id.* at *1. After serving his sentence, Riley filed his §1983 suit alleging that the misconduct charge filed against him was retaliatory and violated the Eighth Amendment. *Id.* At that point, Riley had served his entire sentence. If habeas applied to segregation following misconduct tickets (which it does not), the fact that his sentence was done would have rendered a habeas corpus petition moot because he was no longer in custody. *Spencer*, 523 U.S. at 12-19. Most importantly, a habeas corpus petition did not lie in any event because Riley was not challenging the fact or duration of his confinement and also because good time credits were not at issue since he was serving a life sentence and was ineligible under Michigan law to earn good time. *Preiser*, 411 U.S. at 494; *Edwards*, 520 U.S. at 648. *Riley*, 1999 WL 801560 at *5.

The Sixth Circuit's rationale in *Huey*, and *Riley*, and in this case is also problematic because it has not been consistently applied. In a recent Sixth Circuit decision, *Herron v. Harrison*, 203 F.3d 410 (6th Cir. 2000) the Sixth Circuit allowed Herron to pursue his §1983 First Amendment retaliation claims, even though he was placed in disciplinary segregation and did not favorably terminate his grievances, with no mention whatsoever of *Heck* or *Edwards*.

In *Herron*, the inmate filed two lawsuits against prison officials alleging that his First Amendment right to freedom of religion was being violated. *Herron*, 203 F.3d at 412-413. Additionally, he filed several grievances on his own behalf and on behalf of a group of Muslim inmates. *Id.* at 413. After appearing before the prison grievance board on behalf of a Muslim inmate, Herron got into an altercation with a prison official and was charged with and convicted of creating a disturbance. *Id.* Herron received a sentence of five days in punitive segregation, thirty days' loss of visitation privileges, two months' loss of package privileges, and a three dollar fine. *Id.* Herron then filed suit under §1983, alleging retaliation for asserting his First Amendment right to file grievances and to provide legal assistance to another inmate, as well as due process violations in the conduct of his disciplinary hearing and sentencing. *Id.*

Despite the fact that Herron had not filed a habeas corpus petition and his disciplinary sanction had not been favorably terminated, the Court, with no mention of *Heck* or *Edwards*, held that, except for Herron's failure to plead that his fellow inmate needed legal assistance, Herron had made

out a First Amendment claim that prison officials had retaliated against him for providing legal assistance to another inmate. *Id.* at 416-417. The Court remanded the case to the federal district court to provide Herron with the opportunity to amend his complaint. *Id.* at 417.

The Sixth Circuit's inconsistent application and misapplication of *Huey*'s "unwind the judgment of the state agency" rationale clearly demonstrates that the Sixth Circuit has taken this Court's holding in *Edwards* too far. *Huey*, 230 F.3d at 230. As the Second Circuit Court of Appeals correctly pointed out in *Jenkins v. Haubert*, 179 F.3d 19, 27 (2d Cir. 1999), this Court "has never announced that the *Heck* rule bars a prisoner's challenge under §1983 to an administrative or disciplinary sanction that does not affect the overall length of his confinement." Any such "deprivation that does not affect the fact or duration of a prisoner's overall confinement is necessarily a condition of confinement." *Id.* at 28; *see also Torres v. Fauver*, 292 F.3d 141, 145 (3d Cir. 2002)(holding that "the favorable termination rule does not apply to claims that implicate only the conditions, and not the fact or duration, of a prisoner's incarceration"); *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000)(holding "that the unavailability of federal habeas relief does not preclude a prisoner from bringing a §1983 action to challenge a condition of his confinement that results from a prison disciplinary action.") This Court must resolve the Sixth Circuit's reservations about its mechanical application of *Edwards* to prisoner cases challenging conditions rather than the fact or duration of confinement. Such prisoners do not need to meet a favorable termination requirement and should not be required to do so.

In sum, Congress has answered the first question for cert by excluding habeas and its favorable termination requirement from §1983 suits that challenge prison conditions. No ruling by this court suggests another result. The history of habeas demonstrates its limitation to challenges to the underlying conviction and sentence. The imposition of a favorable termination requirement by the Sixth Circuit was error and the judgment below should be reversed.

II. A PRISONER WHO HAS BEEN BUT IS NO LONGER IN ADMINISTRATIVE SEGREGATION MAY BRING A §1983 CHALLENGE TO HIS CONDITIONS OF CONFINEMENT (PRIOR PLACEMENT IN ADMINISTRATIVE SEGREGATION) WITHOUT FIRST SATISFYING THE FAVORABLE TERMINATION REQUIREMENT OF *HECK*

This case does not implicate the underlying criminal conviction, sentence or good time credits that may affect that sentence. As set out above, therefore, habeas rules, including those requiring a favorable termination, do not apply. The petitioner was no longer in segregation when this case was filed. He challenged as retaliatory his prior placement in segregation. Habeas rules do not apply and §1983 has no favorable termination requirement.

Imposing such a requirement would be tantamount to legislating an amendment to §1983 without action by Congress. Such a judge-made rule would close the federal courthouse to many §1983 plaintiffs and defeat the purpose of the civil rights act (affording a federal forum for the vindication of rights abused by state officials).

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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